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TO THE THIRD EDITION.

The present Edition includes the Commentary on the Settled Land Act, 1884, which was separately published as a Supplement in January, 1885. Notes have also been added to the Settled Land Acts (Amendment) Act, 1887, the Trustee Act, 1888, the Married Women's Property Act, 1882, the Land Charges Registration and Searches Act, 1888, and also to the Vendor and Purchaser Act, 1874.

The Authors are greatly indebted to their friend, Mr. C. H. F. Christie, of the Inner Temple, for very valuable assistance rendered by him in collecting cases, revising proofs, and constructing a new Index.

The Essay on the Law of Real Property, which was prefixed to the former Editions, has now been separately published. It has been sometimes referred to in the text as "Challis, R. P."

The cases have been brought down (a few being in the *Addenda*) to the middle of April, 1889.

References to all the Reports will be found in the Table of Cases. The new series of the Law Journal Reports and Law Times Reports are cited without any addition. The new series of the Jurist is indicated by the addition of "N. S."

LINCOLN'S INN,

30th April, 1889.

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ADDENDA.

Page 6. *Last line of note, for* p. 239, *read* p. 329.

,, 13. *Line* 3 *from top, add :*—But it has been held by Kay, J., in *Re Willett and Argenti*, W. N. 1889, p. 66, that the language of the sub-section is peremptory, and that such costs, and also the costs of obtaining the mortgagee's concurrence, were within its provisions.

,, 41. *Line* 16 *from bottom, after* "*Lady Langdale* v. *Briggs*," *insert* 8 De G. M. & G. 391.

,, 59. *Add at bottom of page :*—Where a lease has been made by a mortgagor in possession under this section, the mortgagee is entitled, on taking possession, to enforce the covenants and conditions contained in the lease in the same way as if he had been a party to it, and this right cannot be affected by any collateral agreement made between the mortgagor and the lessee. (*Municipal Permanent, &c. Society* v. *Smith*, 22 Q. B. D. 70.)

,, 75. *Line* 15 *from top, for* "*Meager*" *read* "*Meagher*"; and *for* W. N. 1889, p. 33, *read* 40 Ch. D. 508. (The name in W. N. is as given in the text.)

,, 99. *After third paragraph, add :*—Two new trustees having been appointed under a power, in place of a lunatic and a trustee out of the jurisdiction, the Court considered it unnecessary to re-appoint the new trustees, but ordered that lands subject to a mortgage, on which part of the trust estate was invested, should vest in the new trustees, and that the right to call for the transfer of a sum of consols forming part of the trust estate should be vested in the trustee out of the jurisdiction; and that, it appearing that such trustee was out of the jurisdiction, the mortgage debt and the right to call for a transfer of the consols should vest in the new trustees. (*Re Batho*, W. N. 1888, p. 118; 59 L. T. 882.)

,, 106. *Line* 24 *from top, for* "*Re Harrison, Harrison* v. *Harrison*, W. N. 1889, p. 7; aff. *ibid.* p. 22," *read* "*Re Little, Harrison* v. *Harrison*, 40 Ch. D. 418." (The name in W. N. is as given in the text.)

,, 108. *Line* 16 *from bottom, after* "*Stanley* v. *Stanley*, 7 Ch. D. 589." *insert* But see now the Trustee Act, 1888, s. 6, p. 318, *post*.

,, 130. *Add at end of fourth paragraph :*—See also *Saul* v. *Pattinson*, W. N. 1886, p. 67; 34 W. R. 561.

,, 132. *Line* 10 *from bottom, after* "paid;" *add* see *Saunders* v. *Kent*, W. N. 1885, p. 147.

,, 134. *Line* 7 *from top, for* W. N. 1888, p. 223, *read* 40 Ch. D. 491.

,, 153. *Line* 7 *from top, for* 1857, *read* 1856.

,, 167. *Line* 27 *from top, for* "*Bennett*," *read* "*Benett*."

,, 176. *Line* 10 *from top, for* p. 316, *read* p. 346.

,, 223. *Line* 10 *from top, for* the full stop *substitute* a colon.

,, 230. *In middle of line* 3 *from bottom, add :*—The appeal was dismissed on 13th April, 1889, upon the ground that the judge had rightly exercised his discretion in this particular case. But it was distinctly laid down that the question as to the costs is in the discretion of the Court. ("The Times," 15th April, 1889.)

Page 262. *Line* 14 *from top, add :*—The Inland Revenue authorities appear to draw a distinction between cases in which the trustee is appointed to succeed a former trustee and cases in which a trustee is appointed for the first time, and to hold that in the latter case no stamp is required. Of course, when a particular case has been adjudicated upon, and stamped with a declaration that no duty is payable, that fact is conclusive as to the particular order in question, which then ought to be passed. (*Re Potter*, W. N. 1889, p. 69.) But Stirling, J., has declined to adopt the above-stated view of the Revenue authorities, and, notwithstanding their adjudication in *Re Potter*, he declined in a subsequent case to give any directions to the registrar, and suggested that the case should be adjudicated upon. (*Re Kennaway*, W. N. 1889, p. 70.) The statement in the text probably requires no correction ; but the Revenue authorities have issued a notice, dated 3rd April, 1889, to the effect that they intend to adhere to their opinion until the question is decided by the Court.

,, 296. *Line* 8 *from bottom, for* p. 392, *read* p. 390.

,, 331. *Line* 12 *from top, add :*—A married woman may, of course, like anyone else, be ordered to give security for the costs of an appeal. (*Weldhen* v. *Scattergood*, W. N. 1887, p. 69.)

,, 332. *Add at end of first note :*—A husband and wife can contract, without the intervention of a trustee, to live apart, in consideration of an undertaking not to take legal proceedings one against the other. (*McGregor* v. *McGregor*, 20 Q. B. D. 529 ; aff. 21 Q. B. D. 424.) Since the M. W. P. Act, 1882, when a married woman is administratrix, it is not necessary that her husband should join in the administration bond. (*In the Goods of Ayres*, 8 P. D. 168.)

THE

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

Amended, 55 & 56 Vict. c. 13. 1892.

(44 & 45 Vict. c. 41.)

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—Preliminary.

Sect. 1.
Short title; commencement; extent.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

Sect. 2.
Interpretation of property, land, &c.

2. In this Act—

The word "includes" would naturally signify "includes in addition to the word's more usual meaning;" and this seems to be its signification in sub-sects. (iii.), (iv.), (vi.) so far as regards the words "mortgagor" and "mortgagee," (viii.), (xi.), (xii.), (xiv.), (xv.), (xvi.) and (xvii.) But where the several particulars

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enumerated are all, or nearly all, such as without enumeration would be supposed to be included, there seems to be no sense in the enumeration unless it was intended to be *exhaustive*. This remark applies to sub-sects. (i.), (ii.), (v.), (vi.) so far as regards the word "mortgage," (vii.), (ix.), (x.) and (xiii.).

The operation of the section is confined to the Act, and no light seems to be thrown upon these definitions by other definitions gathered from other sources. From *Meux* v. *Jacobs*, L. R. 7 H. L. 481, at p. 492, it appears that the definition of "fixtures," occurring in the interpretation clause 17 & 18 Vict. c. 36 (Bills of Sale Act), s. 7, did not apply to fixtures, even though comprised in a bill of sale, unless the operation of the bill of sale was itself affected by the Act.

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

Compare the Conv. Act, 1882, s. 1, sub-s. (4) (i), p. 162, *post*.

The chief things included under "property," which are not, by virtue of the next sub-section, included under "land," seem to be (1) equitable estates for life and *pur autre vie;* (2) personal chattels; (3) legal and equitable choses in action, including mortgage debts; (4) annuities for life not charged upon land, or for years, whether charged upon land or not; (5) terms of years, as to which see the next note; (6) the benefit of building agreements, and similar nondescript equities.

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

This curious definition did not occur in the original draft Bill introduced into the House of Lords by Lord Cairns in 1880. Its effect is to make the Act much less easily susceptible of consistent and intelligent interpretation than would have been the case without it.

The words, "lands of any tenure, houses and buildings," seem to refer to *physical objects;* the other words in the definition seem to refer to *estates and interests*. Though "hereditament" includes land as a physical object as well as certain estates in land, the former meaning has already been expressly introduced into the definition.

The phrase, "land of any tenure," properly means land of freehold, copyhold, and customaryhold tenure. This includes (1) freeholds commonly so called, conformable in all respects to the course of the common law, which is the general custom of the realm; (2) freeholds associated with peculiar customs, such as gavelkind, borough-English, and the like, which in these particulars vary from the course of the common law; (3) copyholds

held by copy of court-roll at the will of the lord; and (4) customary freeholds, which are a peculiar form of copyholds, requiring admittance in order to acquire the legal estate, and usually expressed to be held according to the custom of the manor without any reference to the will of the lord. Although the incorrect and misleading expression, "leasehold tenure," in reference to lands held for a leasehold interest, is sometimes used even by conveyancers of high reputation, yet the phrase, "land of any tenure," does not, in its ordinary usage, include terms of years; nor can it here be supposed to do so, except by making it include all estates and interests in lands, which would render the rest of the definition superfluous.

This ambiguity has been avoided in the S. L. Act, 1882; see s. 2, sub-s. (10) (i.), of that Act, and note thereon, p. 189, *post*.

For the full meaning of the words, "tenements and hereditaments, corporeal and incorporeal," see Challis, R. P. 37—41. Much of this meaning seems to be everywhere excluded from the present Act by the context. In many places where the word "land" occurs in the Act, its meaning is qualified by some addition. Though the definition contains no word which can include any estate or interest less in *quantum* than a freehold, yet in some passages of the Act there seems to be an intention to include under the word "land" a term of years. (See sects. 5, 6, 18, 42, 44, *post*.)

By Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, "land" in Acts of Parliament includes "messuages, tenements, and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure." For the reasons above given, this definition does not seem to include leaseholds; and the phrase, "tenements of some particular tenure," is inaccurate, because tenements can only be of freehold tenure. (See Challis, R. P. 37.) In some cases, such as *Wilson* v. *Eden* (11 Beav. 237, 16 Beav. 153), words denoting real estate have, in a will, and by virtue of s. 26 of the Wills Act, been held to include leaseholds; but this seems to have no bearing upon the proper meaning of the word "land" in Acts of Parliament. The last cited case was discussed at great length in *Prescott* v. *Barker*, L. R. 9 Ch. 174.

The word "land," as used in the V. & P. Act, 1874, appears not to include incorporeal hereditaments. (Dart, V. & P. 6th ed. p. 160; *ibid.* p. 336, note (*t*).)

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

See S. L. Act, 1882, s. 2, sub-s. (10) (i), and note thereon, p. 189, *post*,

(iv.) Manor includes lordship, and reputed manor or lordship:

The court-baron "is an inseparable ingredient of every manor; and if the number of suitors should so fail as not to leave suffi-

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cient to make a jury or homage, that is, two tenants at least, the manor itself is lost." (2 Bl. Com. 91; and see *Bradshaw* v. *Lawson*, 4 T. R. 443, and *Rumsey* v. *Walton*, there referred to, at p. 446; Com. Dig. tit. Ancient Demesne, G. 3, citing 4 Inst. 270, *ad init.*; 2 Roll. Abr. 122, F. pl. 2.) It then becomes a reputed manor. But the customary court remains, if there be copyholders. (Co. Litt. 58 a.)

The failure of tenants is caused by the extinction of their tenancy, which for this purpose is practically a tenancy in fee simple held directly of the manor; but the services are due, not necessarily from the tenant in fee simple, but from the tenant for the time being of the immediate freehold. Watkins has expressed the opinion that a tenancy in fee simple is not necessary for the purpose of qualifying a suitor to the court-baron, and that any tenancy of freehold will suffice. (1 Watk. Cop. 15.) It would hardly be safe, in the absence of judicial decision, to rely upon this opinion. It is true that this opinion is quite consonant with the history and nature of feuds; but it is believed that the old conveyancers endeavoured to prevent the extinction of manors by seeking to evade the statute of *Quia Emptores;* which they would hardly have done if the simple expedient suggested by Watkins would, in their opinion, have been effectual. When the lands of the tenant come to the lord's hands, whether by purchase or by escheat, the tenure is extinguished, because *nemo potest esse et dominus et tenens.* The extinction of the tenure involves the extinction of the services incident thereto; and now, by the statute of *Quia Emptores* (18 Edw. 1), tenure in fee simple cannot be created *de novo* except by the crown; and consequently, no rent-service can be reserved upon a grant or conveyance in fee simple. (*Bradshaw* v. *Lawson*, *ubi supra.*) If the above-cited opinion of Watkins is well founded, a manor which is exposed to danger of extinction by reason of escheat—as in a case where only two tenants of the manor in fee simple exist—might be rendered quite secure by granting a sufficient number of leases for lives.

Franchises and privileges appurtenant to the manor are not destroyed by the extinction of the services, but remain as appurtenant to the demesnes. (Cruise, Dig. Tit. *Tenures,* Ch. III. s. 22.)

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

Note the exception to this definition in s. 7, sub-s. 5, p. 34, *post.*

The words "made by deed" cannot be required to qualify

"covenant," and must, therefore, qualify the preceding words. The punctuation shows the same thing. A conveyance, has, therefore, two characteristics: it is (1) made by deed, (2) made on a dealing with or for property. Therefore, the word does not include a surrender of, or an admittance to, copyholds. It includes surrenders of leaseholds made by deed.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into, and is in possession of the mortgaged property:

See note to s. 15, p. 55, *post*.

Mortgagor will, by virtue of this sub-section, include a *puisne* mortgagee in relation to a prior mortgagee. (*Teevan* v. *Smith*, 20 Ch. D. 724.)

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

This extended meaning of "purchaser" is expressly excluded from s. 3, *post*; see sub-s. (8) thereof, p. 13, *post*.

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(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

Compare s. 2, sub-s. (10) (vii.), of the S. L. Act, 1882, p. 192, *post*.

"Will" seems also to include its usual meaning; and, therefore, to include a will made by a married woman in exercise of a power. Independently of statute, the testamentary power of a married woman stood as follows:—(1) She could devise the legal estate in lands by declaration of use under a power executed by will; (2) She could devise and bequeath the equitable interest in both realty and personalty settled to her separate use; (3) She could at common law make a will of personalty, which would be good if her husband survived her and assented thereto. (1 Jarm. Wills, 4th ed. p. 39.) The Wills Act (7 Will. 4 & 1 Vict. c. 26) made no alteration in the testamentary capacity of married women. As to their testamentary capacity under the Married Women's Property Act, 1882, see s. 1 of that Act, and note thereon, p. 239, *post*.

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares:

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy:

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other

document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print: C. A. 1881, Sect. 2.

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

II.—Sales and other Transactions.

Contracts for Sale.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion. Sect. 3. Application of stated conditions of sale to all purchases.

Sub-sects. (3), (6), and (7) use the word *property;* see s. 2, sub-s. (i.), *ante.*

Sub-s. (1) must be read in connection with s. 2, sub-s. (1) of the V. & P. Act, 1874, and with s. 13 of the present Act.

"Under a contract to grant or assign a term of years, whether "derived or to be derived out of a freehold or leasehold "estate, the intended lessee or assign shall not be entitled "to call for the title to the freehold." 37 & 38 Vict. c. 78, s. 2, sub-s. (1).

The above-cited section contemplates four separate cases: (1st) assignment of existing lease having a freehold reversion; (2nd) grant *de novo* of lease having a freehold reversion; (3rd) assignment of existing lease having a leasehold reversion; (4th) grant *de novo* of lease having a leasehold reversion: in none of which can the title to the *freehold* be called for.

Sub-s. (1) of the present section contemplates the third of the above specified cases, and forbids the title to the *leasehold* reversion also to be called for.

Sect. 13, p. 48, *post,* extends the same principle to those examples of the fourth case, in which a *second* leasehold reversion is interposed between the immediate leasehold reversion upon the intended grant and the freehold; *i.e.*, it applies to contracts for the grant *de novo* of a sub-sub-demise, or lease to be derived out of a lease having a leasehold reversion, but does not apply to contracts for the grant *de novo* of a sub-demise, or lease to be derived out of a lease having a freehold reversion, in which case there is no reason why the contracting lessor should not show his own title. On such a grant of a sub-sub-demise, the title to the second leasehold reversion so interposed cannot be called for.

Absence of "the right to call for the title" does not debar the intending purchaser from taking advantage of grounds of objection ascertained *aliunde.*

A purchaser, buying under a contract not excluding statutory conditions of sale, will be fixed with notice of matters appearing

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on the title for which he cannot call, exactly as if, under the previous law, he had expressly contracted not to call for the vendor's title. (*Patman* v. *Harland*, 17 Ch. D. 353. See also *Nicoll* v. *Fenning*, 19 Ch. D. 258, at p. 267.)

A lessee who accepts a lease in consideration of a fine, stands so much in the position of a purchaser that he ought in prudence to make the same investigation of the lessor's title as would be made by a purchaser. He is exposed, *inter alia*, by s. 44, sub-s. (3), p. 118, *post*, to the danger of having to choose between keeping down a rentcharge and being ejected by the person entitled to receive it. The practice of neglecting to investigate the lessor's title on the grant of a lease, depends for its prudence upon the hypothesis that the annual rent is at or near a rack-rent.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

The purchaser is not debarred from taking objection to the title of the lord to make the enfranchisement ascertained *aliunde*.

It is conceived that in framing conditions of sale of enfranchised copyholds a vendor cannot safely omit to stipulate that the purchaser shall take under and subject to any restrictions and conditions which may be contained in the deed of enfranchisement. It will also be advisable, on a sale of enfranchised copyholds where the enfranchisement was voluntary, to continue, notwithstanding this sub-section, to insert a condition precluding the purchaser from making any objection to the lord's title based on any grounds, however ascertained, and to compel him to assume that the lord had authority to make the enfranchisement. On a compulsory enfranchisement the right to the minerals remains in the lord (15 & 16 Vict. c. 51, s. 48, and 21 & 22 Vict. c. 94, s. 14); and it therefore seems probable that a vendor, selling freeholds "formerly copyhold" without specifying in the contract the mode of enfranchisement, would not be relieved from the necessity of making a title to the minerals.

A vendor selling freeholds which are in fact enfranchised copyholds, but are not in the contract stated so to be, will of course be taken to have contracted to sell the minerals along with the surface; and if he fails to make a good title thereto, the purchaser may rescind. (*Upperton* v. *Nickolson*, L. R. 6 Ch. 436.) But if a contract for the sale of copyholds contains a stipulation that the vendor shall procure their enfranchisement, the purchaser will be taken to have known that on an enfranchisement the lord could reserve the minerals, and cannot rescind upon the ground of such reservation. (*Kerr* v. *Pawson*, 25 Beav. 394.)

Bacon, V.-C., appears, in *Re Agg-Gardner*, 25 Ch. D. 600, to have inferred, from this sub-section, that, upon a voluntary enfranchisement, the lord cannot be compelled to give either an

acknowledgment or an undertaking in respect to the title-deeds retained by him; apparently upon the ground that a subsequent purchaser, under an open contract, cannot call for the lord's title. But it is not clear why, on a subsequent sale, the enfranchised copyholder should be prevented from proving his title, if, on settling the terms of a private contract, an intending purchaser from him should insist upon his so doing.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.

The words "and he shall assume, unless the contrary appears," throw the burden of proof upon the purchaser, without precluding him from showing, either *aliunde* or on the face of the abstract, that the recitals, &c., are in fact incorrect, &c. The previous words, "Nor shall he . . . make any . . . objection," &c., by virtue of sub-s. (11), *infra*, have, in relation to specific performance, no greater efficacy than a similar condition inserted in a contract would have had before the Act, and therefore they cannot be used by a vendor to cloak material defects. (*Edwards* v. *Wickwar*, L. R. 1 Eq. 68; *Else* v. *Else*, L. R. 13 Eq. 196; *Harnett* v. *Baker*, L. R. 20 Eq. 50; *Broad* v. *Munton*, 12 Ch. D. 131; *Smith* v. *Robinson*, 13 Ch. D. 148.) A purchaser will not be precluded from rescinding his contract, if before completion he discovers the existence of restrictive covenants contained in a deed prior to the specified root of title. (*Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778.) Nor will this subsection prevent the rectification of a mutual mistake discovered

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before completion. (*Jones* v. *Clifford*, 3 Ch. D. 779.) It is, of course, possible to prevent any objection being taken on the ground of a defect discovered *aliunde* by the insertion of a special condition, such as that in the case of *Hume* v. *Bentley*, 5 De G. & Sm. 520; where the words "The lessor's title will not be shown and shall not be inquired into," were held to preclude objection, and specific performance was decreed. (See also *Freme* v. *Wright*, 4 Madd. 364.) But for such a purpose the language of the condition must be precise. In *Rosenberg* v. *Cook*, 8 Q. B. D. 162, and *Best* v. *Hamand*, 12 Ch. D. 1, the purchaser failed to recover his deposit; in the latter case on the ground, apparently, that he had himself broken the contract by refusing to abide by the stipulation. It is not clear in either of those cases that, at the suit of the vendor, specific performance would have been ordered against the purchaser. It was held in *Darlington* v. *Hamilton*, Kay, 550, that an under-lessee who had contracted to sell his interest as a *lease*, was disentitled to specific performance, on the ground that other houses were comprised in the superior lease, and that the purchaser might lose his interest by a forfeiture of the superior lease incurred by no fault of his own. In that case it was stated, in argument, that the superior lease contained a provision for the apportionment of the rent and the power of re-entry (see p. 556); but this is referred to only obscurely, if at all, in the judgment.

If there is a stipulated commencement for the title, such commencement must either start with a proper root of title, or else its defects must be clearly shown on the face of the contract. (*Re Marsh and Earl Granville*, 24 Ch. D. 11.)

A sub-recital does not appear, for the purpose of proving the truth of a statement of fact contained therein, to be a recital either for the purpose of this sub-section, or for the purpose of the Vendor and Purchaser Act, 1874, s. 2. The sub-section only enacts that the recital shall be taken to be correct; and in a sub-recital nothing is recited, except the fact that a statement is contained in a former deed.

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

This and the following sub-section are considered together in the next note.

(5.) Where land sold is held by under-lease, the

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purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

The purchaser seems, by virtue of the words "unless the contrary appears," not to be debarred from showing that the lease, or any superior lease, was in fact not duly granted, or from showing that the covenants and provisions contained in the lease, or in any superior lease, have in fact not been duly performed. Sub-s. (11), *infra*, seems to provide that this shall be a good defence to an action for specific performance.

A receipt for a nominal payment, such as a peppercorn, is not a receipt within the meaning of this and the foregoing sub-sections. (*Re Moody and Yates' Contract*, 30 Ch. D. 344.) It also appears, by the last-cited case, that the rent in question must be a payment in money, not in kind.

A receipt by a ground landlord for rent due under a lease, which has been paid under threat of distress, by an under-lessee, is not a receipt for rent due under the under-lease. (*Re Higgins and Percival*, W. N. 1888, p. 172.)

It is conceived that the receipt must be free from grounds of suspicion on the face of it; for example, if an assignment should have been made, where there is a covenant to supply copies to the lessor, the receipt must be in the name of the assignee, and a receipt in the name of the assignor would not prove that the covenant had been performed.

A vendor who commits a breach of covenant after the execution of the contract, cannot avail himself of the provisions of sub-s. (4). (*Howell* v. *Kightley*, 21 Beav. 331.) Continuing breaches would, however, seem to be within the sub-section. (See *Bull* v. *Hutchens*, 32 Beav. 615. See also *Lawrie* v. *Lees*, 7 App. Cas. 19.)

On any sale under a power contained (or implied by virtue of s. 19, sub-s. (i), p. 68, *post*) in a mortgage by demise of leaseholds, the vendor must in the contract or conditions of sale expressly provide for the admission by the purchaser that "all rent due under every superior lease, and all the covenants, &c. of every superior lease, have been paid and duly performed, &c. up to that date." Since no rent is reserved on the under-lease by which he holds, he cannot produce any receipt for it, and therefore his case is not within sub-s. (5). And even if he can produce

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the last receipt for rent due under every superior lease, his case is not within sub-s. (4) from which sales of land held by underlease are excluded. It seems to make no difference in this respect if the mortgage contains a trust of the last days of the superior term in favour of the purchaser.

In a case where the lessor had refused to accept the last instalment of rent, and had commenced an action of ejectment against the lessee, which action had been stayed for non-delivery of particulars, and the vendor had filed an affidavit that, to the best of his knowledge and belief, all the covenants had been performed, and the purchaser, having had an opportunity to inspect the premises, brought no evidence of any breach, it was held that there was sufficient *primâ facie* evidence that no breach had been committed. (*Ringer to Thompson*, 51 L. J. Ch. 42.)

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

A vendor is bound to supply a complete and proper abstract at his own expense; and therefore must bear the expense of abstracting documents not in his possession, which are a necessary part of the title. (*Re Johnson and Tustin*, 30 Ch. D. 42.) He must also complete the title by procuring the execution of any document which is necessary for that purpose; such, for example, as a surveyor's certificate that a house has been completed to his satisfaction. (*Re Moody and Yates' Contract*, 30 Ch. D. 344.)

If a mortgagor enters into a contract for sale, without disclosing the mortgage, it is possible that he may be precluded from taking advantage of this sub-section.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

This sub-section excludes leases and mortgages from the operation of the section. See s. 2, sub-s. (viii.), p. 5, *ante*.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

This sub-section reserves to a purchaser, under the foregoing implied conditions, the common equitable defences. See note on sub-s. (3), *supra*.

As regards trustees, by s. 66, p. 148, *post*, they may sell under the foregoing conditions without incurring liability. But (apart from the effect of the Trustee Act, 1888, s. 3, hereinafter mentioned) to sell under needlessly depreciatory conditions is ordinarily a breach of trust; and in *Dance* v. *Goldingham*, L. R. 8 Ch. 902, an injunction was granted, at the suit of a *cestui que trust*, against the purchasers as well as the trustees, to restrain the completion of a sale, on the ground that the conditions of sale were needlessly depreciatory. Before that Act, the objection that the conditions were needlessly depreciatory, would have been a good defence for a purchaser, as against trustees, in a suit for specific performance; and it may be doubted whether, in cases where the conditions implied by this section, or by s. 13, p. 48, *post*, might be needlessly depreciatory, trustees, though incurring no liability, would obtain specific performance against the pur-

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chaser, if the purchase-money should appear to be inadequate. But a *cestui que trust* who cannot charge his trustee with a substantial breach of trust is not competent to impeach the sale, even before the conveyance, as against the purchaser.

In *Dunn* v. *Flood*, 28 Ch. D. 586, the Court, upon the objection of the purchaser, refused specific performance of a contract for sale made by trustees which needlessly contained conditions of a depreciatory character. This went a step beyond *Dance* v. *Goldingham*, in which case the objection proceeded from the *cestui que trust*. This decision seems to imply that, even after conveyance, the contract might (under the former law) have been re-opened as against the purchaser at the instance of the *cestui que trust*.

The provisions of the Trustee Act, 1888, s. 3, p. 315, *post*, seem sufficient to prevent the inconvenience which might have arisen from these decisions, and to make it now unnecessary, as a general rule, to insert protective conditions in contracts for sale.

Sect. 4. Completion of contract after death.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

Equitable estates seem not to be within this section. Nor if they were within it would it give any greater safety in dispensing with the heir's concurrence in the conveyance of an equitable fee than could be obtained without it. (See sub-s. 2.) His concurrence might always have been dispensed with by a purchaser who could get in the legal estate, when it was certain that the heir's equity had been effectually barred by the contract. But the purchaser is entitled to the heir's concurrence, to prevent questions as to the validity of the contract from arising. (See *Roberts* v. *Marchant*, 1 Ha. 547; aff. 1 Ph. 370.) In *Duly* v. *Nalder*, 35 L. J. Ch. 52, it was held that the heir-at-law of the vendor of an equity of redemption, who had died before completion, was a necessary party to the conveyance. See also *Hoddell* v. *Pugh*, 33 Beav. 489.

The freehold interests other than a fee simple which come

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within the operation of this section, seem to be base fees and determinable fees.

Estates *pur autre vie* limited to the heir as special occupant are not properly said to be "descendible" to him. (*Per* Lord Kenyon, *Doe* v. *Luxton*, 6 T. R. 289, at p. 291.) It would be more prudent not to rely upon their coming within the operation of this section.

The operation of this section will probably be confined in practice to those cases in which a vendor, having contracted to sell the fee simple, dies before completion, either intestate with an infant heir-at-law, or having devised the legal estate to an infant or in settlement. Before the Trustee Act, 1850 (see sects. 7, 30), the purchase-money must have been paid into Court in an action for specific performance, and retained there until the infant attained the age of twenty-one. (*Bullock* v. *Bullock*, 1 Jac. & W. 603.) In such cases, the purchaser, if satisfied (see sub-s. 2, *supra*) as to the validity of his contract, may now take a conveyance of the legal estate from the personal representatives of the vendor, without being obliged to bring an action.

It is conceived that, on the death of a vendor who has contracted to sell for a fee simple, the fee is not "vested on any trust . . . . in" the vendor "solely," within the meaning of s. 30, p. 88, *post*, which seems to contemplate only express trusts. It is true that in *Lysaght* v. *Edwards*, 2 Ch. D. 499, Jessel, M. R., held, that estates contracted to be sold are trust estates for the purpose of passing under a devise of trust estates. But he expressly held that this result was due to the intention of the testator; and the case seems to have no application where no question of intention is relevant. See also the remarks of Lord Cairns in *Shaw* v. *Foster*, L. R. 5 H. L. 321, at p. 338.

The present section seems, unlike s. 30, p. 88, *post*, to be permissive only, enabling the personal representatives to convey the estate without disabling the heir or devisee.

Discharge of Incumbrances on Sale.

Sect. 5.

Provision by Court for incumbrances, and sale freed therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest

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due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

The section is intended to enable charges to be got rid of in cases where the person entitled cannot be found, or where, owing to the infancy of children entitled to portions, the money has not become actually raiseable; or, in the case of jointure rent-charges, where the charge is not redeemable as a mortgage.

As by s. 2, sub-s. (viii.), p. 5, *ante*, "sale means only a sale properly so called," the machinery of this section is not applicable to intended mortgages.

This section applies to ordinary sales *inter partes*, as well as to sales by the Court. Lands may be sold under it free from incumbrances—(1) upon the application of the purchaser in all cases, and (2) on the application of the vendor when the purchaser consents, and is willing to pay into Court a sufficient part of the purchase-money to meet the requirements of the section. But if the purchaser should not consent, it is conceived that the sale could not be made free from incumbrances unless it is either made by the Court, or the vendor is able to provide the required sum of money without the purchaser's assistance; for in the case of an ordinary sale out of Court there seems to be no jurisdiction to order the purchaser to pay any part of the purchase-money into Court before the execution of the conveyance, and no conveyance can be made free from incumbrances until after payment into Court of the required sum. This section cannot have been intended indirectly to confer jurisdiction to make orders for specific performance in chambers; which would practically be the result of ordering the purchaser to pay part of the purchase-money into Court against his will. The word "direct" seems to apply to sales by the Court, and the word "allow" to sales out of Court.

It may sometimes be convenient for the vendor to stipulate in the contract that, on accepting the title, the purchaser shall pay the required sum into Court out of the purchase-money.

In *Re Great Northern Rail. Co. and Sanderson*, 25 Ch. D. 788, Pearson, J., inclined to the opinion that this section does not apply to a perpetual rent-charge secured upon land by statute; and he decided that, at all events, the Court would not compel a vendor to pay money into Court for the purpose of discharging such an incumbrance, whenever this course would inflict great hardship upon him. There are grounds for suspecting that in this case the rent-charge was charged not only upon the land contracted to be sold, but also upon other lands of the vendors.

Sect. 45, p. 120, *post*, provides a general method for the redemption of annual sums charged upon land in perpetuity.

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(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

On the meaning of "incumbrance," see s. 2, sub-s. (vii.), p. 5, *ante;* it might include rent-charges, but not quit rents or chief rents, as to which see s. 45, p. 120, *post.*

Applications under this section must be made by summons at chambers. See s. 69, sub-s. (3), p. 151, *post; Patching* v. *Bull*, 30 W. R. 244; affirmed on appeal, W. N. 1882, p. 113. On the meaning of "the Court," see, as to lands in England, s. 2, sub-s. (xviii.), p. 7, *ante*, and s. 69, sub-s. (1), p. 151, *post;* as to lands in the County Palatine of Lancaster, s. 69, sub-s. (9), p. 151, *post;* and as to land in Ireland, s. 72, sub-sects. (2) and (3), p. 154, *post.* As to the giving of notice, see s. 69, sub-sects. (4), (5), and (6), p. 151, *post;* as to costs, s. 69, sub-s. (7), p. 151, *post.*

Before the Act, land subject to any incumbrance could not be sold, even by the Court, free therefrom without the consent of the incumbrancer. (*Langton* v. *Langton*, 1 Jur. N. S. 1078; *Wickenden* v. *Rayson*, 6 De G. M. & G. 210.)

It is generally understood that the discretion given by this section to "redeem a mortgagee behind his back," will not be exercised, unless it is proved to be impossible to communicate with the mortgagee. Evidence, however, as to the amount of the debt, might be furnished by the form of the receipts given by the mortgagee. Redemption without notice seems to involve the confiscation of any rights of consolidation to which the mortgagee may be entitled; and also of an option to purchase; as to which see *Milford Haven Rail. Co.* v. *Mowatt*, 28 Ch. D. 402; where, however, Pearson, J., seems to have thought that there was not a *bonâ fide* intention of exercising the option. Where purchase-money greatly exceeds the incumbrances, the land may be freed on its payment into Court. (*Archdale* v. *Anderson*, 21 L. R. Ir. 527.)

When the order is made in an action to which the incumbrancer is not a party, it should follow the words of the Act; and after directing payment into Court of the purchase-money, and the setting aside of an amount sufficient to meet the incumbrance, proceed to declare that thereupon any party shall be at liberty to apply in chambers for a declaration that the land is freed from the incumbrance. (*Dickin* v. *Dickin*, W. N. 1882, p. 113; 30 W. R. 887.)

The word "land," by virtue of s. 2, sub-s. (ii.), p. 2, *ante*, includes every estate equal in *quantum* to a freehold, whether

C. A. 1881, Sect. 5.

legal or equitable, in land, except equitable estates for life and *pur autre vie*. But since to restrict the word to this meaning would prevent the special provision respecting dividends mentioned in the section from being extended to a mortgage of a "determinable interest" created by a settlement of renewable leaseholds, or to an annual sum charged upon equitable life estates or on leaseholds, (a supposition which seems foreign to its general purpose,) it is probable that the word "land" is loosely used in the present section to include *every estate or interest whatsoever in land*.

Three cases are contemplated, of which two are specially provided for:—

(1.) An *annual* sum, charged upon any estate or interest whatsoever, including a term of years;

(2.) A *capital* sum, if charged upon a determinable interest;

in either of which cases the capital sum paid into Court (independently of the additional margin of not exceeding ten per cent.) must suffice *by its dividends* to keep down, or *otherwise provide for*, the charge.

The phrase "determinable interest in *the* land" suggests that the passage in which it occurs refers only to sales of estates comprised in settlements, and that *determinable* interest here means a *partial* interest (including a term of years created by a settlement), carved out of some other estate where the whole estate is sold together. This supposition explains why it is required that in these cases the *dividends* shall suffice to keep down the charge; because in such cases there may easily be one or more claims upon the purchase-money in respect of income, and one or more distinct claims in respect of capital. For example, in the case of a sale by tenant for life and remainderman, where there is a mortgage of the life estate, the dividends will represent the income, to which the incumbrancer of the tenant for life is entitled during the latter's life; and the investments will represent what the remainderman is entitled to after the determination of the life estate.

The remaining case is where—

(3.) A capital sum is charged upon any estate or interest other than a determinable interest of the above specified kind; including a term of years subsisting as a separate estate by itself, not as one out of several successive estates or interests created by a settlement and sold all together.

The language of the first sub-section is extremely confused and obscure; and it is impossible, in the absence of judicial decisions, to feel assured confidence as to its meaning. The above-stated hypothesis is offered as an attempt to explain its perplexities.

For a form of order made in a case where land was subject to an annuity, see *Patching* v. *Bull*, 30 W. R. 244.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the

persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof. C. A. 1881, Sect. 5.

It is conceived that under the vague generality of this subsection, the Court will assume jurisdiction to deal with the fund in any way which it thinks proper; among other things, to award to the mortgagee six months' interest in lieu of notice to redeem, or compensation for anticipating the payment of a loan arranged for a time certain, or for any loss which may accrue by the transmutation of his security; and perhaps to indemnify him for the loss (if such should occur) of any right of consolidation to which he may be entitled. The notice appears to be notice given by direction of the Court, and would not include notice given before commencement of the proceedings. Such notices are excepted from the operation of s. 67, p. 149, *post*.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

General Words.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof. Sect. 6. General words in conveyances of land, buildings, or manor.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any

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part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6.) This section applies only to conveyances made after the commencement of this Act.

The phrase "conveyance of land" will probably be held to include an *assignment of a term of years*, either by virtue of the fact that *assignment* is included in *conveyance*, s. 2, sub-s. (v.),

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p. 4, *ante*, or else by enlarging the meaning of *land* beyond that given in s. 2, sub-s. (ii.), *ante*, by virtue of the word's colloquial usage.

General words, as used in conveyances of lands and manors, denote things divisible into three classes:—

(1.) Things which, in construction of law, are parcel of the thing conveyed, or a necessary constituent element thereof, such as the court-baron of a manor, buildings, growing trees, ungotten minerals;

(2.) Easements and other rights, privileges, and franchises which are either appurtenant or appendant to the thing conveyed, such as rights of way, other easements, commons;

(3.) Easements which had formerly been appurtenant to the thing (the *quondam* dominant tenement) conveyed; but had at the time of conveyance become extinguished by the unity of seisin of the dominant and servient tenements in the same hands for an estate of fee simple.

If the unity of seisin is for any less estate, or is not in possession, the easement is not extinguished, but only suspended, and will revive without being regranted upon a severance. (*James* v. *Plant*, 4 A. & E. 749, see p. 762; *Thomas* v. *Thomas*, 2 C. M. & R. 34; *Simper* v. *Foley*, 2 J. & H. 555.)

After such extinguishment, easements cannot pass upon a severance as being, properly speaking, appurtenant to the *quondam* dominant tenement. But easements which are *continuous* and *apparent*, will, upon a grant of the *quondam* dominant tenement, be re-created by way of implied grant, without the use of any words to express such an intention; and even though they first sprang up as usages during the union of the seisin. (*Ewart* v. *Cochrane*, 4 Macq. 117, see p. 122; *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Pearson* v. *Spencer*, 1 B. & S. 571, at p. 588; *Polden* v. *Bastard*, L. R. 1 Q. B. 156, at p. 161; *Allen* v. *Taylor*, 16 Ch. D. 355; *Bayley* v. *Great Western Rail. Co.*, 26 Ch. D. 434; *Russell* v. *Watts*, 10 App. Cas. 590.)

The doctrine of *Pyer* v. *Carter*, 1 H. & N. 916, which appears often to be confused with the doctrine referred to in the preceding paragraph, is in reality widely different. It refers, not to the question, what rights on occasion of a severance are obtained by the *granted* tenement as against the tenement *retained by the grantor?* but to the question, whether any, and if so, what, rights are obtained by the grantor in favour of the tenement which he retains, as against the tenement which he grants? In *Pyer* v. *Carter* it was decided that the retained tenement stands in as favourable position, for this purpose, as the granted tenement. This doctrine appears to be opposed to the maxim upon which the doctrine discussed in the preceding paragraph depends, that a grantor cannot derogate from his own grant; and it seems to have been overruled by the cases of *Suffield* v. *Brown*, 4 De G. J. & S. 185, and *Wheeldon* v. *Burrows*, 12 Ch. D. 31. In *Russell* v. *Watts*, 10 App. Cas. 590, the House of Lords carefully refrained from throwing doubt upon *Wheeldon* v. *Burrows*, and indeed seem to have approved of that case. The doctrine of that case was well expressed by Lord Holt in *Tenant* v. *Goldwin*, 2

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Ld. Raym. 1089, at p. 1093; and is laid down in *Curriers' Company* v. *Corbett*, 4 De G. J. & S. 764.

If the easements are not continuous and apparent, the grantor, in order to revive them, must either employ words of express grant, or must describe them as "used and enjoyed with" the land conveyed, or in similar terms. (*James* v. *Plant*, 4 A. & E. 749; *Barlow* v. *Rhodes*, 1 C. & M. 439, at p. 448.)

Notwithstanding the *dicta* in some early cases, it may now be taken as settled that, agreeably to general principle, easements of necessity, like other easements, are extinguished by unity of seisin, but that upon a severance of the tenements a new easement of necessity is newly created if the necessity continues. (*Per* Parke, B., in *Pheysey* v. *Vicary*, 16 M. & W. 484, at p. 491; and see *Holmes* v. *Goring*, 2 Bing. 76.) And the new easement is limited in its extent by the extent of the existing necessity. (*Corporation of London* v. *Riggs*, 13 Ch. D. 798.)

The doctrine, that easements which cannot pass as appurtenant may be granted *de novo* by words denoting user as distinguished from words denoting appurtenancy, was formerly thought to apply only to easements which had existed previously to and had been extinguished by the unity of seisin: see *Thomson* v. *Waterlow*, L. R. 6 Eq. 36; *Langley* v. *Hammond*, L. R. 3 Exch. 161. But in recent cases it has been held that the doctrine applies also to easements (or rather, usages in the nature of easements) which have grown up during the unity of seisin. (*Watts* v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360; *Barkshire* v. *Grubb*, 18 Ch. D. 616.) The two last-cited cases show that, in regard to this point, there is no difference between continuous easements and easements which are used only from time to time.

In the case of *Beddington* v. *Atlee*, 35 Ch. D. 317, the following points appear to have been assumed or decided:—(1) The doctrine of implied grant of easements holds good since the Judicature Acts, with regard to equitable owners, so far as their power to make a title extends; (2) when the adjoining tenements are not held in the same right, as, for example, where the owner of one is seised of the other in trust for another person, the doctrine will not apply; (3) after contracting to sell one tenement, the vendor, being a trustee for the purchaser, is for this purpose seised of it *en autre droit;* and therefore the doctrine will not apply on the sale by him of another adjoining tenement; (4) the point was raised, but not decided, whether an express mention of appurtenances will, by virtue of sub-s. (4), prevent an implied grant, by virtue of sub-s. (2), of easements other than those at the time actually existing as legal easements. This seems to have been decided in the affirmative in *Birmingham, &c., Banking Co.* v. *Ross*, 38 Ch. D. 295, see p. 308. But it could hardly be held that those words would prevent the grant *de novo* of easements which had merely been extinguished by unity of seisin.

The word "enjoyed" in sub-s. (2) does not include whatever is, as a matter of fact, enjoyed, however precariously; but refers only to what is enjoyed in such a way as to give rise to a reasonable expectation that the enjoyment will be permitted to continue. (*Per* Cotton, L. J., in *Birmingham, &c., Banking Co.* v. *Ross*, 38 Ch. D. 295, at p. 307.)

As it is the easement which is appurtenant to the dominant tenement, and not the subjection to the easement which is appurtenant to the servient tenement, there seems, so far as the present question is concerned, to be no need for, nor even any meaning in, the distinction between cases of severance in which the dominant tenement is conveyed and those in which the servient tenement is conveyed. No question of appurtenancy, or of the grant of an easement *by the person conveying*, can arise in the latter cases.

The doctrine of grant (or regrant) by words of user, rests upon the hypothesis that there is an actual user at the time of the grant. With regard to such easements as admit, not only of being extinguished in law by unity of seisin, but of being visibly interrupted and destroyed in fact, they would seem, if so interrupted and destroyed between the execution of the contract and of the conveyance, not to be included under the phrase "easements . . . . *at the time of conveyance* demised, occupied or enjoyed with, or reputed or known as, part or parcel of or appurtenant to the land." This view is confirmed by *Roe* v. *Siddons*, 22 Q. B. D. 224. As the rights of the purchaser date from the contract and not from the conveyance, it follows that, whenever the vendor retains contiguous lands, the contract should expressly provide for the grant of easements admitting of such physical interruption, unless it is certain that none exist.

It is conceived that a purchaser buying upon an open contract could not now insist upon the insertion in the conveyance of express general words. See s. 66, sub-s. 1, p. 148, *post*.

Of things parcel of a manor, some, as mines and minerals, admit of severance, and others, as the court-baron (Shep. T. 240), do not; unless upon a grant by the king (Scriv. Cop. 4th ed. 601). The severance here meant is severance from the *seignory*, which must not be confused with the corporeal hereditaments in the tenure of the lord. Anything once severed cannot be re-united to the manor so as to become parcel of it (*Revell* v. *Jodrell*, 2 T. R. 415, see p. 419; *Delacherois* v. *Delacherois*, 11 H. L. C. 62); for which reason "mines and minerals" seem to have been inserted among the general words relating to a manor, and not among those relating to land. Mines and minerals severed from land can be re-united at will; and the specific mention of things parcel of the thing conveyed not only is useless, but may be dangerous if the enumeration is not exhaustive. (*Denison* v. *Holiday*, 3 H. & N. 670.)

"Warrens and law-days, or view of frank-pledge, will not pass by a grant of the manor, unless they are mentioned, or the grant be of the manor with the appurtenances." (Prest. Shep. T. 240.) They will now pass, unless a contrary intention is expressed. View of frank-pledge, or the court-leet, had become obsolete in Lord Coke's time. (2 Inst. 72.)

By a demise of a manor to which an advowson is appendant, without saying *cum pertinentiis*, the advowson does not pass. (*Higgins* v. *Grant*, Cro. Eliz. 18.) The present section contains nothing to alter this rule.

C. A. 1881, Sect. 7.

Covenants for Title.

Covenants for title to be implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

These implied covenants are almost universally adopted in practice: perhaps in reliance upon the improbability that, in any given case, they will come to be practically tested. It would be imprudent to rely upon them in any case where it is foreseen that the covenants for title may need to be enforced; because their exact scope would, in any given case, be more difficult to ascertain than that of the express covenants formerly in use.

Although the operation of this Act is restricted to England and Ireland, any of the provisions of this section might, by express declaration contained in any particular deed, be extended by reference to apply to conveyances of land situated elsewhere.

On conveyance for value, by beneficial owner.

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

The ambiguous expression, "conveys and is expressed to convey as beneficial owner," if strictly construed, would import that no covenant will be implied as against a person who, *nihil habens in tenementis*, in fact conveys nothing, though he be expressed to convey something. The word *conveys* would probably be held to mean, *is named as a conveying party in the operative part of the conveyance.* Sub-s. (4), *infra*, uses only the phrase *expressed to convey.*

It would seem that the use of the words *as beneficial owner conveys* will carry the covenants, even if the party purporting to convey is not in fact a *beneficial owner*, nor does in fact convey anything, but only joins in the conveyance for the purpose of entering into the covenants.

"Conveyance" does not, in this section, include "demise by way of lease at a rent": see sub-s. (5) and note thereon, p. 34, *post.*

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"Conveyance for valuable consideration" seems here to include a settlement made in consideration of marriage; although the words "purchase for value," occurring in the covenant, do not. To such settlements the forms (A) and (B) seem to apply, as well as the form (E), thus enabling the settlor, by using the appropriate language, to adopt either set of covenants at will. This opinion seems to be commonly adopted in the profession, and it is in accordance with the usual practice; by which covenants for title are carried up to the last purchase for money, or money's worth, not stopping short at a conveyance in consideration of marriage; although marriage settlements which comprise landed estates sometimes contain covenants for title similar to those contained in conveyances on sales. This is due to the fact that, previously to a sale, the title is usually investigated, which, of course, is not usually done previously to a marriage settlement.

The voluntary surrender of a lease, not being for any valuable consideration, seems not to be capable of containing these implied covenants; and in such case an express covenant against incumbrances should be inserted in the deed of surrender. The same end might be attained by the use of the words "as trustee," or "as mortgagee," by virtue of (F), p. 32, *post;* but such use of the words is very inappropriate. It might be doubted whether a surrender in consideration of the intended grant of a new lease is for valuable consideration within the meaning of this subsection.

Right to convey.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who

Quiet enjoyment.

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so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and

Freedom from incumbrance.

Further assurance.

C. A. 1881, Sect. 7.

to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

This follows the common form of covenants for title in the conveyance of an absolute interest. In the case of a life tenant and remainderman, the word "share" is very inappropriate; and it would be prudent for the life tenant to insist on the insertion of the proviso limiting the extent of his covenants which was formerly in use. But sales and exchanges by life tenant and remainderman will be in future to a great extent superseded by sales, &c., made under the S. L. Act, 1882, by the tenant for life alone. As to conveyances by joint tenants, see Prideaux, Conv. Prec. 12th ed. vol. 1, p. 280, form No. XLVII., in which each of two joint tenants purports, "as to one undivided moiety, as beneficial owner," to convey. This phrase is not properly applicable to joint tenants, since they are seised *per mie et per tout*, and not in undivided moieties. And though Lord Coke (Co. Litt. 186 a) says that, "to divers purposes each of them hath but a right to a moitie, as to enfeoffe, give, or demise, or to forfeit," he did not thereby intend to intimate that it is proper to speak of them as if they owned "undivided moieties" (which is notoriously not the case), but only to remark that each separately could not alienate or forfeit more than a moiety. It is not sufficiently clear that by the use of such language the operation of the covenant is confined to a moiety as regards each joint tenant; and at all events the operative part of such deeds is incorrect in form. In Key & Elphinstone, Conv. Prec. 2nd ed. vol. 1, p. 384, a form of proviso is given, the object of which is to restrict what would otherwise be the liability of each joint tenant under the implied covenants, to a liability in respect to one moiety only. Such a proviso would be valid by virtue of sub-s. (7), p. 35, *infra*.

There seems to be no reason to suppose that the words "or anyone through whom he derives the title, otherwise than by purchase for value," extend the covenant to the acts of every person in the chain of title from whom the estate was not derived by purchase for value, notwithstanding the intervention of a purchase for value. Title is derived from all the earlier links through each one of the succeeding links; and if the derivation through one of the latter is "by purchase for value," the derivation from each of the former is also, among other things, "by purchase for value."

Covenants implied by virtue of this section will prevent a bill of sale given by way of mortgage from being "in accordance" with the form given in the schedule to the Bills of Sale Act, 1882, 45 & 46 Vict. c. 43, which contains no covenants for title;

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and such a bill of sale will be void under s. 9 of the Act. (*Ex parte Stanford, Re Barber*, 17 Q. B. D. 259.)

The apportioned expenses of paving a new street are not an incumbrance within the meaning of this implied covenant against incumbrances. (*Egg* v. *Blayney*, 21 Q. B. D. 107.)

A purchaser in fee simple from a person who had purchased from a trustee in bankruptcy, has no remedy under these covenants, if evicted from the actual possession by a lessee who claims through the bankrupt otherwise than through the trustee. (*Woodward* v. *Corporation of Margate*, 2 Times Rep. 829.)

On conveyance of leaseholds for value, by beneficial owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Here "conveyance" includes the assignment of an existing lease, but not the grant *de novo* of a lease at a rent. See sub-s. (5), p. 34, *infra*.

Validity of lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

This enactment does not make any provision for the usual covenant by the purchaser to indemnify the vendor for the future against rent and covenants. This covenant must, therefore, be

expressly inserted in assignments of leaseholds. Without any express covenant on the part of the assignee, he will be liable to indemnify the original lessee against damages for any breach of covenant occurring during such assignee's own tenancy. (*Moule* v. *Garrett*, L. R. 7 Exch. 101.)

The most common case in which covenants for title in leases are practically useful, is in leases by limited owners in excess of their powers. In such cases it may happen that the persons entitled to evict the lessee are also liable under the covenants for title. Leases by limited owners will in future be for the most part made under the powers of the S. L. Act, 1882; and the possible utility in this respect of covenants for title, as to some extent rectifying the result of exceeding the lessor's powers, will in such leases be restricted to cases in which that Act has been misapprehended. Covenants for title should by no means be neglected, though they are not very likely in any given case to be actually enforced.

On mortgage, by beneficial owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

A transfer of a mortgage, at all events where no fresh advance is made, does not seem to be a "conveyance by way of mortgage," but rather a conveyance of an existing mortgage for valuable consideration.

Right to convey.

Quiet enjoyment.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person

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conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

Freedom from incumbrance.

Further assurance.

It will be observed, that the covenant for quiet enjoyment after default is restricted to disturbance by the mortgagor and persons claiming under him; whereas the corresponding express covenant in common use before the Act contained no such restriction, but was expressed to be against disturbance by any person or persons whomsoever.

On mortgage of leaseholds by beneficial owner.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant

by a person who conveys and is expressed to convey as beneficial owner (namely): C. A. 1881, Sect. 7.

See note on sub-s. (5), p. 34, *infra*.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them:

Validity of lease.

Payment of rent and performance of covenants.

It is conceived that this form will be held to apply to mortgages by demise; though its language is well adapted only to mortgages by assignment.

(E.) In a conveyance by way of settlement, the

On settlement.

C. A. 1881, Sect. 7.

following covenant by a person who conveys and is expressed to convey as settlor (namely):

For further assurance, limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required:

Marriage settlements sometimes contain covenants for title similar to those contained in conveyances on sales. Voluntary settlements seldom contain any, beyond (at most) a covenant for further assurance.

It is conceived that, in a marriage settlement, the use of the words "as beneficial owner" by the settlor will cause to be implied as against him the covenants specified in (A.) or (B.), *supra*, as the case may require. See note, p. 25, *ante*.

On conveyance by trustee or mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in

anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction; and a covenant on his part shall be implied accordingly.

A covenant implied under this sub-section does not lie open to the doubt noted at p. 24, *ante*, by reason of the occurrence elsewhere of the word "conveys," in addition to "is expressed to convey." But if the fact that a person, who in the operative words is expressed to convey, has in reality nothing to convey, does not prevent the implication of the covenants, this sub-section is superfluous; since its apparent object might be attained by the simple device of making the directing party purport to convey and be expressed to convey as beneficial owner. In such cases the actual conveying party could be merely expressed to convey, so that (sub-s. 4, *infra*) no covenant would be implied as against him.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

The second half of this sub-section seems to be merely explanatory of the first. Its apparent object might (sub-s. 2, *supra*) be secured by expressing that the wife conveys both as beneficial owner, and also by the direction of the husband directing as beneficial owner. The language of the sub-section is somewhat obscure; and prudent persons might, perhaps, not unreasonably, prefer to dispense with its assistance.

C. A. 1881, Sect. 7.

By the Married Women's Property Act, 1882, s. 1, sub-s. (3), any contract made by a married woman after December 31, 1882, will bind her separate estate, "unless the contrary be shown." Before the coming into operation of that Act, a *feme covert* could not covenant; and her separate estate was, strictly speaking, not bound by her covenant, but only in equity by her declaration of intention in that behalf.

The concurrence of the husband will not be needed in conveyances of property of a wife married after the commencement of the last-cited Act, or in any case in which the title to the property has accrued after such commencement.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

Here "conveyance" seems to include a demise by way of mortgage; that not being by way of lease at a rent; unless, perhaps, in cases where the mortgagor attorns tenant to the mortgagee. But even in the last-mentioned cases, it is conceived that the covenants for title would be implied by the use of the words "as beneficial owner." The present sub-section seems to aim at including all "conveyances" which usually contain covenants for title under such forms as are above set forth, and at excluding those which do not usually contain them.

Strictly speaking, the right to admittance can in general only be conferred by *surrender*, though by the special custom of some manors (see *Thompson* v. *Hardinge*, 1 C. B. 940) it may be conferred by deed. But "conveyance," by s. 2, sub-s. (v.), p. 4, *ante*, includes covenant to surrender made by deed.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person

in whom that estate or interest is, for the whole or any part thereof, from time to time vested. C. A. 1881, Sect. 7.

It is conceived that the last words of this sub-section mean, *in whom any part of the property is vested, for the whole estate or interest, in that part, of the implied covenantee;* and that they would not apply to the tenant of an *estate carved out of* the estate of the implied covenantee; as, *e.g.*, a lessee for years, the implied covenantee being seised in fee.

The benefit of the usual covenants for quiet enjoyment and further assurance undoubtedly runs with the land. See 1 Smith, L. C. 8th ed. p. 80; 9th ed. *ibid.*

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

It seems that the deed by which the covenant may be varied or extended is not necessarily the conveyance in which the covenant is implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

Execution of Purchase Deed.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor. Sect. 8. Rights of purchaser as to execution.

(2.) This section applies only to sales made after the commencement of this Act.

This section does not extend to mortgages. "Sale" means only a "sale properly so called." (See s. 2, sub-s. viii., p. 5, *ante.*)

Viney v. *Chaplin*, 2 De G. & J. 468, decided that, where no special circumstances existed to make the demand unreasonable, the purchaser was entitled (1) to have the conveyance executed in the presence of his solicitor; (2) to pay the purchase-money to the vendor himself.

Essex v. *Daniell*, L. R. 10 C. P. 538, decided that the question

C. A. 1881, Sect. 8.

whether such demand was reasonable was a question for the jury.

The vendor may now insist upon executing the conveyance in the absence of the purchaser, but the purchaser may specially appoint a person to attest such execution.

The definition of "conveyance" (s. 2, sub-s. v., p. 4, *ante*) does not include surrender of copyholds. This section, therefore, does not extend to such surrenders, though it extends to the execution of covenants to surrender. Surrenders must be made in person, if demanded, except in special cases of disability. (Scriv. Cop. 4th ed. 127.)

It is conceived that this section only applies in the absence of and subject to any express contract between the parties; though it seems to have been specially selected for making no allusion to the question.

A "sale" seems to be "made" as soon as a binding contract has been concluded.

As to the payment of purchase-money to the vendor's solicitor, see s. 56, p. 132, *post*.

Production and Safe Custody of Title Deeds.

Sect. 9. Acknowledgment of right to production, and undertaking for safe custody of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

The language of this section is very wide and incautious in its terms. It contains nothing to restrict the "person" giving the acknowledgment to persons having lawful possession of the documents, or to restrict the recipient ("that other") to persons having any interest or estate in the property to which the documents relate. Though the machinery supplied by sub-s. (7), *infra*, would probably not be set in motion in favour of a person having an absurd claim within the precise letter of the section, yet under some circumstances such a claim might be made troublesome without the particular help of the Court referred to in that sub-section. An acknowledgment obtained from a trustee or mortgagee, or even from a person wrongfully in possession of the documents, might be used to obtain production, in an action of ejectment, of documents which would not otherwise be ordered to be produced. The person having the documents might be served with a writ of *subpœnâ duces tecum;* and, if he refused to produce them, he might be harassed by an action for damages.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the

C. A. 1881, Sect. 9.

possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the

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specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court, may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

The ordinary covenant for production (as distinguished from safe custody) of title-deeds, in most cases only expressed, and gave a *legal* remedy in respect of, a right which could be enforced in *equity*, independently of express contract. (Dart, V. & P. 6th ed. p. 473, ch. 9, s. 2. See *Fain* v. *Ayers*, 2 Sim. & Stu. 533.) But the purchaser was ordinarily entitled to a valid covenant for the production, and probably for the right to take copies, of title-deeds not delivered to him. (Dart, p. 626, ch. 12, s. 5.) For the liability to give this covenant is now substituted (sub-s. 8) the liability to give an acknowledgment. The grammar of that sub-section seems to be defective, the word "of" being required after "production;" but its meaning is made sufficiently clear by the language of sub-s. (4).

Although the word "retains" is not properly applicable to a person who receives possession for the first time, yet there is little doubt that this section will be held to extend to such cases.

The substitution of an "acknowledgment" in the place of the old covenant for production has become universal in practice, as also has the substitution of an "undertaking" in the place of the covenant for safe custody. For some remarks upon the relative advantages of the old and the new practice, see the next note. It is of essential importance to ascertain that the person

who professes to give an "acknowledgment" or "undertaking," has the documents at least under his control at the time of giving them, since the benefit of them is not obtained unless the person giving them "retains possession of" the documents. It also seems that the person claiming the benefit must be prepared to prove this matter of fact. Probably the presumption will be held to lie in favour of the custody of the documents having gone as indicated by the title. But, if this presumption should be rebutted by actual proof that the person giving the "acknowledgment," &c., had not in fact the documents, either in his possession or under his control, at the time of giving it, there can be no doubt that the Act gives it no validity whatever. The old covenant had this advantage, that it equally bound the covenantor, whether he had or had not the documents in his possession or power.

As to the giving of "acknowledgments" on sales of infants' lands under the S. L. Act, 1882, see note on s. 59 of that Act, at p. 291, *post*.

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the

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production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

The effect of an acknowledgment coupled with an undertaking appears to be nearly equivalent to that of the limited covenant usually given before the passing of the Act by fiduciary vendors. It is difficult to give any reason why the passing of the Act should alter the practice, since it contains no provision for so doing; but a diversity in practice has sprung up since the Act, some conveyancers requiring only an acknowledgment from fiduciary vendors, others requiring an undertaking also. Though the practice of requiring the above-mentioned covenant from fiduciary vendors is not of great antiquity, it was, previously to the passing of this Act, so thoroughly established that, as it imports nothing intrinsically unreasonable, fiduciary vendors ought, in the absence of express stipulation, to be compelled to enter into the covenant; and, therefore, to give both acknowledgment and undertaking. The Act contains nothing to reduce their liability, though the liability of ordinary vendors, who seem now to be placed upon the same footing as fiduciary vendors, is reduced. Ordinary vendors, giving both an acknowledgment and an undertaking, seem to stand in nearly the same position as when their ordinary covenant under the former practice was qualified by a proviso for determining the liability upon their procuring a substituted covenant from any person to whom they might deliver the deeds. But, in the absence of stipulation, it seems that ordinary vendors could not formerly have insisted upon the insertion of this proviso. (Dart, V. & P. ch. 12, sect. 5.) The only difference between their present position and their position under the covenant qualified by the proviso seems to be, that they are now under no obligation, by virtue of the undertaking, to give notice to the covenantee of a change in the ownership or custody of the deeds. This difference makes the effect of an acknowledgment coupled with an undertaking much less beneficial to purchasers than the old covenant qualified by the proviso.

It has, in some quarters, been assumed that in *Re Agg-Gardner*, 25 Ch. D. 600, Bacon, V.-C., expressed an opinion that a fiduciary vendor is not bound to give an undertaking. The case appears to have been decided upon other grounds; and

the opinion expressed by the learned V.-C. was that, under the special circumstances, the vendors could not be called upon to give either an acknowledgment or an undertaking. It is submitted that fiduciary vendors should be compelled to give an undertaking, at all events if and so long as the documents remain in their respective personal custody. C. A. 1881, Sect. 9.

It will be observed that in sub-s. (9), *supra*, there is nothing to except trustees, who come into possession of documents impressed with an "undertaking" previously given, from the liability imposed by the sub-section.

Though the Act has omitted to make the release of a holder's liability depend upon his handing the deeds to a lawful claimant, it is desirable that a person parting with title-deeds affected by acknowledgments, &c., should be careful to deliver them to the person legally entitled to receive them. For, if the Courts should supply this omission, a question might arise if, in the case of settled lands, the holder for the time being of the deeds should, even with the approbation of the legal tenant for life, hand them to the remainderman. The person who has actual possession of the deeds, whether rightly or wrongly, is liable to produce them; but it would not follow that because, in the case supposed, the remainderman would become liable, therefore the original holder would be relieved.

The following rules as to the custody of, and right to, title-deeds, may here be noted:—

(1.) The right to the custody usually follows the right to the estate, and the necessity for production of the deeds in order to protect the estate. (*Lord Buckhurst's Case*, 1 Rep. 1.)

(2.) If several persons have each an equal right to the custody, he who actually has the deeds is entitled to retain them. (*Davies* v. *Vernon*, 6 Q. B. 443; *Foster* v. *Crabb*, 12 C. B. 136.)

(3.) A legal tenant for life is entitled to the custody, as a matter of right. (*Strode* v. *Blackburn*, 3 Ves. jun. 222, at p. 225; *Garner* v. *Hannyngton*, 22 Beav. 627.) An equitable tenant for life, if he has obtained the custody, may retain the deeds. (*Taylor* v. *Sparrow*, 4 Giff. 703. See also *Lady Langdale* v. *Briggs*, 4 W. R. 703.)

(4.) The Court will interfere with the right of the legal tenant for life only when their safety is endangered by his fault, or where they are required by the Court for purposes of administration. (*Leathes* v. *Leathes*, 5 Ch. D. 221; *Stanford* v. *Roberts*, L. R. 6 Ch. 307.) In the former case the Court refused to order the deeds to be brought into Court by the tenant for life at the instance of the remainderman, merely on the ground that the remainderman's title to a part of the estate was disputed, and that the tenant for life might prejudice him by showing the title to an adverse claimant.

(5.) It seems that the mere fact that a tenant for life is out of the jurisdiction will not interfere with his right to the custody. (*Leathes* v. *Leathes*, *ubi supra*. See, however, *Jenner* v. *Morris*, L. R. 1 Ch. 603.)

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(6.) The rule laid down by V.-C. Wood in *Warren* v. *Rudall*, 1 J. & H. 1, in which case he refused to order the deeds in Court to be delivered out to a legal tenant for life, on the ground that, though the Court will not interfere as between a father tenant for life and a son entitled in remainder, it will interfere as between two strangers standing in the same positions, was denied to be law by Jessel, M. R., in *Leathes* v. *Leathes*, *ubi supra*, at p. 223, and would probably not be sustained.

(7.) A husband is entitled, while in receipt of the rents of his wife's lands, to the custody of the title-deeds; but the above-stated rule as to the right of a legal tenant for life does not apply to his trustee in bankruptcy. (*Ex parte Rogers*, *In re Pyatt*, 26 Ch. D. 31.) It is doubtful whether the rule applies to his express assignee. (*Ibid. per* Cotton, L. J., at p. 33.)

(8.) When deeds are in the hands of a person claiming no title, they cannot be recovered from him by a person entitled to a portion only of the lands to which they relate; but in such a case the deeds will be ordered to be brought into Court. (*Wright* v. *Robotham*, 33 Ch. D. 106.)

(9.) The legal tenant for life will not be permitted to hand over the title-deeds to another person to the prejudice of the remainderman; but in such a case the Court will interfere. (*Ford* v. *Peering*, 1 Ves. 72.)

The opinion is generally entertained that an acknowledgment and undertaking, when executed separately from the conveyance, need not be under seal, and that they require only a 6*d.* agreement stamp. Whether an acknowledgment alone requires any stamp, is open to doubt. Such a document is only the statement that a right exists, together with a definition of its precise extent. This right does not commence upon, or merely by reason of, its statement, but, as above mentioned (p. 38, note), it might be enforced in equity independently of express contract. Such a statement is, therefore, not an agreement. But in the absence of judicial decision, it will be wise to affix a 6*d.* stamp.

III.—Leases.

Sect. 10. Rent and benefit of lessee's covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate,

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and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this Act.

It is conceived that the words "lease" and "lessee" must have in this section the same meaning as in the 32 Hen. 8, c. 34, where they include leases for life or lives and terms of years, but not estates tail. (Co. Litt. 215 a, resolution 3.) On the meaning of *firmarii*, see 2 Inst. 145. On the meaning of the words "lessor" and "lessee," see Lit. sect. 57.

It is also conceived that the words "having reference to the subject-matter thereof," must be interpreted to restrict the covenants and conditions contemplated by this section to those which are within the 32 Hen. 8, c. 34. ("The covenants whereof grantees by this statute shall take advantage are inherent covenants; *i. e.*, such covenants as do concern the thing granted, and tend to the supportation of it." Shep. T. 176. And see the remark at the end of this note, p. 46, *infra*.)

This section deals with three distinct subjects, which are often confused together:—(1st) The apportionment of *rent* reserved by a lease, so far only as regards the *right to recover* it, not as regards the right to re-enter, under a condition or proviso for re-entry upon non-payment of the rent; (2ndly) the apportionment of the benefit of lessee's *covenants* contained in a lease, so far only as regards the right of the reversioner to sue for *damages* for a breach, not as regards the right to re-enter, under a proviso for re-entry upon a breach of the covenant; and (3rdly) the apportionment of *conditions* contained in a lease, which concerns the right to re-enter upon a breach.

As regards the first branch, this section seems to add nothing to the rights given by the common law to *legal* owners of reversions. As regards the second branch, it is doubtful whether the section adds anything to the rights given by the 32 Hen. 8, c. 34, to such *legal* owners. But the words "entitled . . . to the income," seem to include *equitable* owners also. As regards the third branch, the change made in the law by this section is still more important.

It is conceived that the words, "condition of re-entry," do not include a right of entry for condition broken which has accrued previously to the assignment of the reversion, and that the assignee cannot now, as formerly he could not, take advantage of such a right. (See Litt. sect. 347.) The 8 & 9 Vict. c. 106, s. 6, does not appear to authorize the assignment of a right of entry which has accrued by the breach of a condition. (*Hunt* v. *Bishop*, 8 Exch. 675, at p. 680; *Hunt* v. *Remnant*, 9 Exch. 635, at p. 641; *Crane* v. *Batten*, 2 W. R. 550.) A continuing breach, as of a covenant to repair, will of course give to the

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assignee a new right of entry accruing after the assignment. (*Bennett* v. *Herring*, 3 C. B. N. S. 370.)

(I.) As to the apportionment of rent reserved by a lease, upon a severance of the reversion in a part of the lands from the reversion in another part, so far only as regards the right to recover the apportioned rent.

If the rent consists of money, or anything admitting of subdivision (but not otherwise, Litt. sect. 222), it is apportionable at common law upon such a severance, whether the severance is effected by surrender of a part of the lands (Co. Litt. 148 a); or by a grant or devise of the reversion in a part (*Ibid.;* 2 Inst. 504; *Collins and Harding's Case*, 13 Rep. 57); or by re-entry of the reversioner upon a part only, under a special condition (*Ibid.* at p. 58); or by eviction of the tenant from a part, by a title paramount to that of the lessor (*Smith* v. *Malings*, Cro. Jac. 160); or by a partition among coparceners of the reversion (*Ewer* v. *Moyle*, Cro. Eliz. 771); or by the different descent of the reversion in different parts of the lands; as where borough-English and common law lands are comprised in a single lease (*Ibid.*).

The apportionment is according to the respective values of the severed parts. If the lessee is not a party, he is not, by an apportionment agreed upon between the reversioner and his grantee, precluded from insisting that the apportionment shall be legally made by a jury. (*Bliss* v. *Collins*, 5 B. & Ald. 876.)

(II.) As to the apportionment of the benefit of lessee's covenants contained in a lease, upon such a severance as above mentioned, so far only as regards the right of the reversioner to sue for damages.

Two questions arise:—whether the benefit will pass (1) to an assign of the whole reversion; (2) to an assign of the reversion in a part.

Although the burden of the lessee's covenants (the covenants being what are commonly styled "inherent" covenants, and not collateral) would, at common law, pass to an assign of the *lands*, yet at common law the reciprocal benefit probably did not pass to an assign of the *reversion* (1 Wms. Saund. 299); so that the latter could sue neither the lessee nor the lessee's assigns for a breach of the lessee's covenants.

But, by the 32 Hen. 8, c. 34, s. 1, the benefit of the lessee's covenants, being inherent covenants, passes to an assign of the reversion. The statute provides, that all grantees or assignees of any reversion of any hereditaments, and their heirs, executors, successors and assigns, shall have and enjoy like advantages against the lessees, their executors, administrators and assigns by entry for non-payment of the rent, or for doing of waste, or other forfeiture; and, also, every such like advantage, benefit and remedies *by action only*, for not performing of other conditions, *covenants or agreements* contained in their leases against the lessees, their executors, administrators and assigns, as the

lessors themselves, their heirs or successors, might have had and enjoyed. C. A. 1881, Sect. 10.

On the whole subject since the statute, both as to what covenants are qualified to run, and when they will run, with the land, and also with the reversion, see *Spencer's Case*, 5 Rep. 16; and the notes thereto in 1 Smith, L. C.

It is to be observed that, according to the 2nd resolution in *Spencer's Case*, which is often misapprehended, the naming of the assigns *on the part of the covenantor*, will, in certain cases, cause a covenant to be inherent which would not otherwise be inherent. These cases are, where the covenant affects something which is not parcel of the thing demised at the date of the covenant, but which will, when it comes into being, be such parcel.

The benefit of the lessee's covenants would, previously to the present section, have passed to the assign of the reversion in a part of the lands, so far as the covenants referred to that part. (*Twynam* v. *Pickard*, 2 B. & Ald. 105; and see *Henniker* v. *Turner*, 4 B. & Cr. 157; *Walter* v. *Maunde*, 1 Jac. & W. 181; *Mayor of Swansea* v. *Thomas*, 10 Q. B. D. 48.) Similarly, the burden of a covenant to repair, being divisible, would have passed to an assign of part of the lands. (*Congham* v. *King*, Cro. Car. 221.)

It is conceived that the wide language of this section must be subjected to a similar restriction; and that the owner of the reversion in a part can enforce only such covenants as refer to that part.

(III.) As to the apportionment of conditions contained in a lease, notwithstanding such a severance of the reversion as above mentioned.

Here, also, we have to consider the effects of (1) assignment; (2) severance.

"By the common law, no grantee or assignee of the reversion could take advantage of a re-entry, by force of any condition." (Co. Litt. 215 a.)

The words of the above-cited Act of 32 Hen. 8, "by entry, for non-payment of the rent, or for doing of waste, or other forfeiture," extend the benefit of entry for a breach to breaches of other conditions besides a condition for re-entry upon non-payment of rent. But only to "such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for not doing of waste, for keeping the houses in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like, ... so as *other forfeiture* shall be taken for other forfeiture like to those examples which were there put, viz., of payment of rent, and not doing of waste, which are for the benefit of the reversion." (*Ibid.* 215 b, resolution 12.)

By a "condition incident to the reversion, or for the benefit of the estate," Lord Coke seems here to mean a condition of re-entry for the not doing of something which is incident to the reversion, or which is for the benefit of the estate.

The assignee of a *particular estate carved out of the reversion in*

C. A. 1881, Sect. 10.

the whole of the lands may take advantage of conditions. (*Ibid.* 215 a, resolution 4.)

But (except as next hereinafter mentioned) the assignee of the reversion in *a part of the lands* could not (previously to the present section) take advantage of conditions. (*Ibid.* resolution 5; *Dumpor's Case*, 4 Rep. 119; see also *Knight's Case*, 5 Rep. 54.)

The exceptions to the above rule were (1) the king (Co. Litt. 215 a, see resolution 6); (2) an assignee taking by act of the law only; as where borough-English lands and common law lands are comprised in the same lease, and the reversion descends upon different heirs. (*Ibid.* resolution 7.)

And as to the apportionment of conditions of re-entry for non-payment of rent, see 22 & 23 Vict. c. 35, s. 3.

22 & 23 Vict. c. 35, s. 3.

> "Where the reversion upon a lease is severed, and the "rent or other reservation is legally apportioned, the "assignee of each part of the reversion shall, in respect of "the apportioned rent or other reservation allotted or "belonging to him, have and be entitled to the benefit of "all conditions or powers of re-entry for non-payment of "the original rent or other reservation, in like manner as "if such conditions or powers had been reserved to him "as incident to his part of the reversion in respect of the "apportioned rent or other reservation allotted or belonging to him."

The words, "notwithstanding severance of that reversionary estate," suggest that the operation of the preceding part of the section is restricted to altering the law touching *severance*, and that only those covenants and conditions are within its scope, which are within the 32 Hen. 8, c. 34. (See Co. Litt. 215 b, resolution 12, cited above.) The subsequent part of the section seems to annex to the beneficial ownership for the time being the right to enforce covenants contained in a lease granted by a tenant for life, whether equitable or legal, and whether in exercise of his statutory power of leasing, or in exercise of a power conferred by the settlement.

Sect. 11. Obligation of lessor's covenants to run with reversion.

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be

taken advantage of and enforced against any person so entitled. C. A. 1881, Sect. 11.

(2.) This section applies only to leases made after the commencement of this Act.

This section deals with the running of the *burden* of the *lessor's* covenants with the reversion notwithstanding severance.

It is conceived that reversions upon leases for life or lives and terms of years are within this section, but not reversions upon estates tail. (See note to s. 10, *ante*.)

The 32 Hen. 8, c. 34, s. 2, gives to all farmers, lessees and grantees of any hereditaments for term of years, life, or lives, their executors, administrators and assigns, the like action, advantage, and remedy against all persons and corporations, having any grant of the reversion of the same hereditaments, *or any parcel thereof*, for any condition, covenant, or agreement contained in their leases, as the lessees might have had against the lessors, their heirs and successors.

The obscure words of the present section, "if and as far as the lessor has power to bind the reversionary estate," &c., and, "if and as far as the lessor has power to bind the person," &c., seem to mean, that the covenants may be enforced against any person for the time being in of the reversion, as against whom the term is valid.

Only legal owners of the reversion are liable; but they will be liable without any reference to the question, how they came into the reversion. For example, if the lease be (validly) granted by a tenant for life under a power, whether statutory or otherwise, the covenants will be binding upon the person entitled in remainder after the death of the tenant for life.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land, comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease. Sect. 12. Apportionment of conditions on severance, &c.

C. A. 1881, Sect. 12.

(2.) This section applies only to leases made after the commencement of this Act.

This section deals with the running with the reversion, notwithstanding severance of the benefit of conditions annexed to the estate of the lessee, a subject which has already been fully dealt with in s. 10, *ante*. (See note thereon.)

The words in s. 10, "and every condition of re-entry and other condition therein contained," seem to have been left in the Act by inadvertence, when s. 12 was inserted.

One coparcener cannot enter alone for a breach. (*Doe* v. *Lewis*, 5 A. & E. 277.)

Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the 22 & 23 Vict. c. 35, s. 3 (cited above, note to s. 10, p. 46, *ante*), provides for the apportionment of conditions of re-entry *for non-payment of the rent*.

Sect. 13. On sub-demise, title to leasehold reversion not to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.

This section has been noted in connection with s. 3, sub-s. (1), p. 7, *ante*, to which it properly belongs.

When an intending lessor, himself holding by sub-lease, contracts to grant a sub-sub-lease, his intending lessee cannot "call for the title to" the leasehold estate out of which the sub-lease is derived. This seems to mean, that he may call for the sub-lease itself, but not for the title of the person granting it.

It may sometimes be advisable, in such contracts, for the intending lessee to stipulate that the original lease shall be produced, and the title duly deduced thereunder.

The word "sub-demise" in the marginal note is misleading, and not consistent with the rest of the marginal note.

Forfeiture.

Sect. 14. Restrictions on and relief against forfeiture of leases.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the

C. A. 1881, Sect. 14.

particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

The words, "by action, or otherwise," seem to be emphatic; and the lessor's common right of entry upon a breach does not arise (except in the cases referred to in sub-sects. 6 and 8, *infra*) until he has complied with the formalities prescribed by this sub-section. Lessors must be careful not to take possession, *e. g.*, of vacant houses, without serving the required notice; because their possession might, under such circumstances, be held to be a wrongful possession. It will be in the discretion of the Court to grant relief against a lessor who has entered into possession without having given the required notice, upon the terms upon which relief would have been given in an action of ejectment. The sub-section, however, does not appear to make such an entry simply illegal, but only to expose the lessor who makes it to a risk that his title may be re-opened by the Court.

It may be doubted whether it is necessary to specify the particular details of the breach of the covenant, or whether it would not be sufficient to specify the particular covenant which has been broken.

It has been decided by the Queen's Bench Division, that the word "and," which occurs before the words "in any case," is strictly cumulative. (*Law* v. *Bradshaw*, The Times, 15th July, 1884.) A notice which specifies the breach, but does not require the lessee to remedy it or to make compensation, is insufficient. (*North London Land Co.* v. *Jacques*, W. N. 1883, p. 187, 32 W. R. 283; *Jacques* v. *Harrison*, 12 Q. B. D. 136, 165; *Greenfield* v. *Hanson*, 2 Times Rep. 876.) The lessee should be made a party to the application when it is made by mortgagees. (*North London Land Co.* v. *Jacques*, *supra*.)

This enactment does not apply to a proviso for cesser of the interest of a lessee or assignee upon the *performance* of a condition by the *lessor* or assignor. Mortgages to building societies are often made subject to such a proviso upon payment of the instalments of principal and interest: a practice which probably was adopted to avoid the expense of a reconveyance, before the 6 & 7 Will. 4, c. 32, s. 5 (see now 37 & 38 Vict. c. 42, s. 42) revested the mortgaged property upon the execution of a statutory receipt indorsed on the mortgage.

An agreement for a lease is not a lease within this sub-section, unless the lessee is entitled to specific performance. (*Swain* v. *Ayres*, 21 Q. B. D. 289.) It is not clear that an agreement for a lease is a lease for this purpose, even when specific performance would be decreed. (*Ayling* v. *Mercer*, W. N. 1885, p. 166; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220. See, however, the

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remarks of Lord Esher, M. R., in *Swain* v. *Ayres*, *supra*, at p. 293.)

A notice under this sub-section may run concurrently with a notice previously given merely to repair. (*Cove* v. *Smith*, 2 Times Rep. 778.)

Upon the distinction between forfeiture of the lease and forfeiture of a privilege annexed thereto, see note on sub-s. (8), *infra*.

As to the methods of serving notice on the lessee, see s. 67, sub-s. (3), p. 150, *post*.

A notice addressed to the original lessee "and all others whom it doth or may concern," and served upon the occupier, is a sufficient notice to an assignee of the original lessee. (*Cronin* v. *Rogers*, 1 Cab. & Ell. 348.) If more than one house is included in the same lease, it would seem that service upon the occupier of one only is sufficient; but it would be the safer course to serve the notice upon all the occupiers.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

In some leases, the proviso for re-entry stipulates that notice shall be given before a forfeiture is enforced. (See Davidson, Conv. Prec. 3rd ed. Vol. V. pp. 156, 189, 392.) Any terms or restrictions imposed on the lessor by the proviso in the lease must be complied with, in addition to those imposed by sub-s. (1), *supra*, so far as they are not identical.

"A right of re-entry . . . . shall not be *enforceable*": the Act does not merely say, shall not be *enforced*, which might relate only to getting judgment. A right which is not *enforceable* by action can hardly be a sufficient ground to maintain the action. It therefore seems that the prescribed notice must be served by the lessor, and that he must wait a "reasonable time" before he issues the writ.

The compensation in money seems to possess two characteristics: it must be (1) reasonable, (2) to the satisfaction of the lessor. Perhaps, under this vague language, the lessor will

obtain considerable latitude in making his demand, without losing his costs if an action should ensue.

A breach which has been remedied before it is detected by the lessor seems not to have been contemplated by sub-s. (1), unless it is taken to be not "capable of remedy," as having been already remedied. But the word "capable" seems rather to mean "intrinsically capable." Probably, such a case will be held to be within sub-s. (1), and the lessor's notice will refer only to the "reasonable compensation in money."

This section applies to breaches occurring before the commencement of the Act. (*Quilter* v. *Mapleson*, 9 Q. B. D. 672.)

As to the terms upon which relief may be granted, see *Bond* v. *Freke*, W. N. 1884, p. 47.

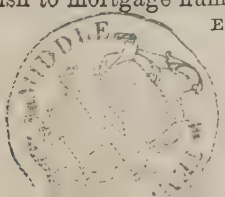
In *Ebbets* v. *Booth*, "The Times," 7th July, 1883, Stephen, J., refused to grant relief against a forfeiture, upon the ground that the breach committed by the lessee had placed the lessor in danger of a forfeiture to his superior landlord, who was not before the Court.

In *Scott* v. *Brown*, W. N. 1884, p. 209; 51 L. T. 746, Kay, J., refused to grant relief under the discretion given by this sub-section. In *Mitchison* v. *Thompson*, 1 Cab. & Ell. 72, Lord Coleridge, C. J., appears to have granted relief to a lessee, though the demised premises were in a very dilapidated condition, and he claimed no relief in his pleadings.

It seems that, even when the lessee has been served with the prescribed notice, and has omitted to comply, he may still apply to the Court for relief, under sub-s. (2). How the application should be made, is less clear. When the lessee himself brings the action, he would naturally ask for relief in the claim. When the application is made in an action brought by the lessor, the substantive trial can hardly have been intended to take place over a summons in chambers. It is conceived that proceedings under this section are not within s. 69, sub-s. (3), p. 151, *post*. But in *Bond* v. *Freke*, W. N. 1884, p. 47, the application was made in chambers, and no objection was taken.

An under-lessee is entitled to apply for relief under this sub-section, if in danger of losing his under-lease by a forfeiture of the superior lease for breach of covenant; and this (of course) applies to the under-lessee of one house, where several houses are comprised in a single lease, and the breach has occurred in one of the other houses. (*Cresswell* v. *Davidson*, W. N., 1887, p. 87; 56 L. T. 811.) In the same case it was also held that where several houses are held under one lease, a breach of covenant occurring in one house may be a sufficient cause for a forfeiture of the whole; and it is difficult to understand how such a question could have been seriously disputed.

The enactment of this section has perhaps impaired the efficacy of certain covenants sometimes found in leases; for example, a covenant upon every assignment or sub-letting to deliver a copy of any deed relating to the transaction, and pay a stipulated fee, to the lessor's solicitor, which does not seem to come within sub-s. (6), *infra*. Such a covenant sometimes imposes a very sensible burden upon persons engaged in building transactions, who may wish to mortgage numerous houses held under separate



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leases from the same lessor. Under the present law, it is not probable that a condition of forfeiture for the breach of such a covenant could be enforced; and the lessee is therefore under a strong temptation to break the covenant, because the consequences, even if rigorously enforced by the lessor, are not likely to be much more onerous than the punctual performance of the covenant would have been. It will therefore be, in future, advisable that lessors, who desire strictly to enforce such covenants as are here referred to, should insert an additional covenant on the part of the lessee, to pay a substantial sum by way of liquidated damages in case of a breach of any of his other covenants.

There is nothing to show that a lessee has any remedy left under this sub-section when once the lessor has obtained lawful possession, whether by action or otherwise. In such a case the lessor cannot be said to be "*proceeding . . . to enforce*" his right. This implies, of course, that a proper notice has been given under sub-s. (1), and that a "reasonable time" has been allowed.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

For some remarks upon determinable limitations as distinguished from limitations liable to be determined by re-entry for breach of condition, see Challis, R. P. 198, 199. Since a "lease limited to continue as long only as the lessee abstains from committing a breach of covenant," is *ipso facto* determined by a breach, without any entry by the lessor, it is a curious

theoretical question, what is the estate of such a lessee who obtains relief, and where the estate comes from? The 4 Geo. 2, c. 28, s. 4, and the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 1, provide, in cases of relief against forfeiture for non-payment of rent, that the lessee shall hold the demised lands without any new lease. It might be well for a lessee, in applying for relief under this sub-section, to ask for a declaration that he is entitled to have a new lease for the residue of the term. See the form of pleadings in *Hack* v. *Leonard*, 9 Mod. 91.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

A covenant or condition against assigning, &c., *without the lessor's consent*, seems clearly to be within the provision (i). The addition, "such consent not being arbitrarily withheld," implies no contract by the lessor not to refuse his consent arbitrarily, but an arbitrary refusal leaves the lessee at liberty to assign without consent. (*Treloar* v. *Bigge*, L. R. 9 Exch. 151.) There is no reason to suppose that, as was argued, but not decided, in *Pierson* v. *Harvey*, 1 Times Rep. 430, a covenant of this description is not within the above-mentioned provision. The responsibility of deciding whether a refusal is arbitrary or not is very onerous; and this qualification, if inserted in a lease, should therefore be put into the shape of a covenant by the lessor. It seems that, for the purpose of an action for specific performance, it will be sufficient if the vendor has procured the necessary licence in the interval between the contract and the completion of the purchase. (*Ellis* v. *Rogers*, 29 Ch. D. 661.)

As to the meaning of "bankruptcy," see s. 2, sub-s. (xv.), p. 6, *ante*. Filing a bankruptcy petition under the Bankruptcy Act, 1883, was held, at any rate by virtue of s. 149 of that Act, if not *simpliciter*, to be within a condition against filing "a petition in liquidation" contained in a lease made before the coming into operation of the Conveyancing Act, 1881. (*Ex parte Gould, Re Walker*, 13 Q. B. D. 454.)

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.

These enactments (Lord St. Leonards' Act, 1859, 22 & 23

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Vict. c. 35, ss. 4—9; the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 2) contained the previous law as to relief against forfeiture for neglect to insure against fire. By 22 & 23 Vict. c. 35, ss. 4 and 6, a court of equity was empowered to relieve *once*, when no loss had happened and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application in conformity with the covenant. By the C. L. P. Act, 1860, s. 2, this power was given to the courts of law.

The repealed s. 7 gave to the person entitled to the benefit of a covenant, on the part of a lessee or mortgagor, to insure against fire, the benefit of any subsisting insurance not effected in conformity with the covenant. Sect. 8 protected a *bonâ fide* purchaser of leaseholds, if there was subsisting a proper insurance, and he had been furnished with the written receipt for the last payment of rent accrued due before the purchase. These two important provisions have not been re-enacted.

But it would seem that 14 Geo. 3, c. 78, s. 83, will enable the lessor or mortgagee to require the insurance money to be laid out in reinstating the building. (See note on sect. 23, *post*.)

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

The Court of Chancery at an early period assumed jurisdiction to grant relief against forfeiture for non-payment of rent at an indefinite time after execution; but the usual practice was not to grant relief after six months had elapsed. This limit was made compulsory by 4 Geo. 2, c. 28, ss. 2—4; which provision is in effect re-enacted and superseded by 15 & 16 Vict. c. 76, s. 210. The above-mentioned sections of 4 Geo. 2, c. 28, were repealed by the Statute Law Revision Act, 1867.

By 15 & 16 Vict. c. 76, s. 211, it is provided that the lessee proceeding for relief in a court of equity shall not have or continue an injunction against proceedings in ejectment, unless, within forty days after a full answer made by the lessor, he brings into Court the money due and costs.

By s. 212 of the same Act, it is provided that if a tenant at any time before trial in ejectment shall tender or pay into Court the rent and arrears and costs, all further proceedings in the action shall cease. In such case no new lease is necessary.

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 1, it is provided that in ejectment relief may be given in a summary manner, upon rule or summons, up to and within the like time after execution, and subject to the same terms and conditions as to payment of rent, costs, and otherwise, as in the Court of Chancery.

In *Bowser* v. *Colby*, 1 Ha. 109, a lessee seeking relief in respect of a lease forfeited for non-payment of rent was not required to pay the money into Court before the hearing, no *interim* injunction having been granted and the lessor being in possession.

The relief granted by the Court against forfeiture or penalty

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did not extend to permitting a privilege to be obtained by a party who had not performed the conditions on which it was granted; *e.g.*, a right of re-purchase (*Davis* v. *Thomas*, 1 Russ. & My. 506); the renewal of a lease (*Bastin* v. *Bidwell*, 18 Ch. D. 238). And since the commencement of the Act, in *Ruttledge* v. *Whelan*, 10 L. R. Ir. 263, C. P. D., the Court refused to grant relief against forfeiture of a right of renewal, the renewal fees having been demanded and not paid within the prescribed time.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

IV.—Mortgages.

Sect. 15. Obligation on mortgagee to transfer instead of re-conveying.

15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

Here "the terms" do not mean merely the payment of principal, interest, and costs; and a tenant for life, having the right to redeem a mortgage held by the remainderman, cannot require the latter simply to transfer the mortgage to a stranger; because the latter would not hold it upon the same terms as the tenant for life would, if it were reconveyed. (*Alderson* v. *Elgey*, 26 Ch. D. 567.) Kay, J., has held (*Buck* v. *Campbell*, 1887, B. No. 3369, at Chambers, 5th March, 1889) that the section applies after judgment for foreclosure.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

See Conv. Act, 1882, s. 12, and note thereon, p. 180, *post*.

Before the last-mentioned Act was passed, it had been decided that the phrase "mortgagor entitled to redeem," in the present section, includes a puisne mortgagee; and that, on a conflict of claims between the actual mortgagor and a puisne mortgagee, the latter would be entitled to exercise the right given by this section. (*Teevan* v. *Smith*, 20 Ch. D. 724.)

A mortgagor could not under this section require a transfer to be made where he could not, independently of the section, have

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required a reconveyance. (*Teevan* v. *Smith*, *supra*.) This defect is cured by the above-mentioned section of the Conveyancing Act, 1882; and a mortgagor can now require such transfer in spite of intermediate charges.

The persons entitled to redeem are summarised in Fisher on Mortgages, par. 1208 *et seq.*; Coote on Mortgages, ch. 83, s. 3; Seton on Decrees, Part IV. ch. 25, s. 1 (4th ed. p. 1051); to which must be added the case of a lessee holding under a lease granted by the mortgagor, not in exercise of a power, subsequently to the execution of the mortgage. (*Tarn* v. *Turner*, 39 Ch. D. 456.)

It is conceived that the exception in sub-s. (2) must be confined to the mortgagee himself who is or has been in possession, and that it does not extend to others who have not. Also, that if a mortgagee is, or has been, in possession, this will not prevent him, if otherwise qualified, from exercising the right to require an assignment; because he exercises his right by standing in the shoes of the mortgagor by virtue of sub-s. (1), not in his proper capacity of mortgagee, which alone is referred to in sub-s. (2).

The objection against compelling a mortgagee in possession to transfer his charge sufficiently appears from the following passage:—"If a mortgagee in possession assigns over his mortgage, without assent of the mortgagor, the mortgagee is bound to answer the profits, both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to a person insolvent." (1 Eq. Ca. Abr. 328. See also *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Company*, 4 App. Cas. 391.) But this objection does not seem to apply where the mortgagor himself is the requesting party and there are no mesne incumbrancers. Nor does it seem to apply if the mortgagee is no longer in possession, unless he went out of possession in such a way as to leave himself still liable to account upon the footing of being in possession.

A distinction must be drawn between transferring a mortgage and concurring with the mortgagor in conveying the mortgaged property freed from the mortgage. The latter may not be done to the detriment of puisne incumbrancers, of whose charges the mortgagee has notice. (*West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. D. 954.)

Sect. 16. Power for mortgagor to inspect title deeds.

16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. C. A. 1881, Sect. 16.

The mortgagor has the right himself to "make copies," while a person entitled to the benefit of an "acknowledgment" under s. 9, p. 36, *ante*, has not. Such a right seems properly to be confined to persons having some ownership in the deeds.

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. **Sect. 17.** Restriction on consolidation of mortgages.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.

It is conceived that the words "seeking to redeem" will not be restricted to redemption actions, but will be held to apply also to foreclosure actions, where the objection against consolidation is more obvious than in redemption actions.

The whole costs of an action for foreclosure of two mortgaged properties cannot be charged upon both properties, unless the mortgages can be consolidated, but the costs must be separately apportioned between the properties. (*De Caux* v. *Skipper*, 31 Ch. D. 635; overruling *Clapham* v. *Andrews*, 27 Ch. D. 679.)

Consolidation (which differs widely from tacking, where several incumbrances over the *same* property are united in the hands of the person having the *legal estate*) consists in the right of an incumbrancer to refuse to be redeemed, except upon condition that the person seeking to redeem shall also fulfil some duty or claim other than the payment of the whole of the moneys secured by the incumbrance. The exercise of this right may be divided into two principal heads:—

(I.) Consolidation of one Incumbrance with others.

An incumbrancer may generally refuse to suffer one incumbrance to be redeemed, after default has been made at the appointed time for redemption (*Cummins* v. *Fletcher*, 14 Ch. D. 699), unless the person seeking to redeem is willing also to redeem every other incumbrance in his hands, as to which similar default has been made, created by the same mortgagor,

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or his representatives in title, over different property. But the assignee of an equity of redemption (including an incumbrancer) cannot be forced to redeem incumbrances created subsequently to the assignment. (*Jennings* v. *Jordan*, 6 App. Cas. 698; overruling, on this point, *Tassell* v. *Smith*, 2 De G. & J. 713.)

For the cases and distinctions, which are exceedingly numerous, see Fisher on Mortgages, par. 1033 *et seq.*; Coote on Mortgages, 4th ed. p. 830 *et seq.*; 1 Wh. & Tu. L. C. 5th ed. p. 674 *et seq.*

Note, that *Beevor* v. *Luck*, L. R. 4 Eq. 537, was much questioned by Lords Selborne and Blackburn in *Jennings* v. *Jordan*, and subsequently not followed by Fry, J., in *Harter* v. *Colman*, 19 Ch. D. 630.

A mortgagor entitled to the ultimate residue of the sale moneys of a mortgaged property sold under the power of sale, does not seem to be a person "seeking to redeem" the mortgage. Therefore this section contains nothing to prevent the mortgagee from applying the balance of the sale moneys to make good the deficiency on another mortgage in his hands. (*Selby* v. *Pomfret*, 3 De G. F. & J. 595.) The trusts of the sale moneys contained in s. 21, sub-s. (3), p. 72, *post*, seem to give no greater right to the mortgagor in this respect than the usual trusts in a mortgage deed.

(II.) Consolidation of Incumbrance with Bond, or other Specialty, or Simple Contract, Debt.

As against the heir of a mortgagor, but not as against the mortgagor himself—(*per* Lord Hardwicke, *Morret* v. *Paske*, 2 Atk. at p. 53; *Archer* v. *Snatt*, 2 Stra. 1107; and the distinction is now clearly settled, though Lord Keeper Guildford, in *Baxter* v. *Manning*, 1 Vern. 244, once held the contrary)—an incumbrancer of real estate may refuse to be redeemed, except upon satisfaction of any bond or other specialty debt of the same mortgagor in his hands. (*Shuttleworth* v. *Laycock*, 1 Vern. 245; *Morret* v. *Paske*, 2 Atk. 52; *Anon.*, 2 Ves. sen. 662; *Coleman* v. *Winch*, 1 P. Wms. 775; *Elvy* v. *Norwood*, 5 De G. & Sm. 240.)

The rule does not apply to the case of a devisee for the payment of debts. (*Heams* v. *Bance*, 3 Atk. 630.) But, since the Statute of Fraudulent Devises, it has applied to the case of a mere devisee. (*Challis* v. *Casborn*, Prec. Cha. 407.)

The case of *Margrave* v. *Le Hooke*, 2 Vern. 207, lies curiously upon the border between the two kinds of consolidation. A man separately mortgaged lands of which he was tenant in tail, and other lands of which he was tenant in fee simple. On his death, all the lands descended to the heir-at-law, who was also the heir in tail. The entail had never been barred, and the mortgage was not binding on the heir so far as regards the intailed lands. Thus the money purporting to be secured on the intailed lands became only a specialty debt secured by the covenant in the mortgage. It was held that the heir must redeem all the lands or none.

Formerly the bond or other specialty must have specified the heirs, in order to give this right to consolidate. But now see s. 59, p. 136, *post*.

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As against the executor, in cases of mortgages of chattels, this rule has been applied to simple contract debts (*Spalding* v. *Thompson*, 26 Beav. 637); even though the estate represented by the executor was insolvent. (*Re Haselfoot's Estate*, L. R. 13 Eq. 327.) The liquidator of an insolvent company has been held to stand, in this respect, in a position similar to that of an executor. (*Re General Provident Assurance Co.*, L. R. 14 Eq. 507.) But these cases were disapproved of and not followed by Jessel, M. R., in *Talbot* v. *Frere*, 9 Ch. D. 568. See also *Christison* v. *Bolam*, 36 Ch. D. 223.

It seems that, since the 3 & 4 Will. 4, c. 104, simple contract debts may be consolidated as against the heir. (*Thomas* v. *Thomas*, 22 Beav. 341.)

The present section contains nothing to interfere with this kind of consolidation.

The section was probably intended to provide that, if the mortgage sought to be redeemed itself allows consolidation, all others in the mortgagee's hands may be consolidated with it; but that, if the mortgage sought to be redeemed does not allow consolidation, only those may be consolidated with it which themselves allow consolidation.

Leases.

Sect. 18. Leasing powers of mortgagor and of mortgagee in possession.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

It will be the safer course not to assume that the insertion of a new proviso for redemption, in a transfer of a mortgage originally made before the commencement of the Act, so far constitutes a new mortgage as to incorporate the statutory powers of sects. 18 and 19. The introduction of such a proviso does not by itself constitute a new mortgage. The statutory powers may, if desired, be incorporated by express declaration on occasion of any transfer to which the mortgagor is a party. See sub-s. (16), *infra*. Though s. 19, *post*, contains no corresponding provision, its powers might, of course, be incorporated by reference.

Independently of this section, there is no privity between the mortgagee and a lessee holding under a lease made by the mortgagor alone subsequently to the mortgage. The mortgagee could neither distrain upon nor sue such lessee in respect of rent due under the lease; though he might compel payment of it to him by threat of ejectment. Payment of the rent in consequence of such threat discharged the lessee from the claim of the mortgagor thereto; but the lessee remained the mortgagor's tenant. It is clear that a statutory lease made subsequently to the mortgage by the mortgagor in possession will create the relation of landlord and tenant between the mortgagee, if he takes possession, and the lessee.

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It is a common practice for the mortgagee to insist upon the exclusion of sub-s. (1), which, taken in connection with sub-s. (10), *infra*, authorizes a mortgagor to grant building leases at a peppercorn rent for five years, without necessarily inserting any stipulation for the due prosecution of the work. Where the character of the property renders it advisable that a power of leasing without the consent of the mortgagee should be reserved to the mortgagor while in possession, there is no difficulty in inserting an appropriate power in the mortgage deed; and, even if the exclusion of sub-s. (1) is not insisted upon, it would probably be of advantage in many cases to exclude the right of the mortgagor to grant such building leases as are mentioned in this section, and to substitute a modified power. This can apparently be done by virtue of sub-s. (13), *infra*.

In cases where a tenant for life mortgages his life interest, the exclusion of this sub-section seems to be practically useless; because, if the mortgagee goes into possession, this will prevent the exercise of the mortgagor's power of leasing under this section, while, if he does not go into possession, the mortgagor will still, notwithstanding the exclusion of his power under this section, be able to grant leases under his power conferred by s. 6 of the S. L. Act, 1882. See s. 50, sub-s. (3), p. 275, *post*.

It does not clearly appear that the mortgagor, if suffered to retain the power, might not insert in a lease provisions prejudicial to the reversion, or omit to insert provisions usually inserted for the benefit of the reversioner. The section contains no provision that any lease made under the statutory power must contain usual or appropriate covenants.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

To the statutory power of leasing given by sub-s. (2) to the mortgagee, there is, from the mortgagee's point of view, this objection, that, since it is given to any mortgagee in possession, a prior mortgagee might be compelled to incur the responsibilities of taking possession against his will, in order to prevent a subsequent mortgagee in possession from exercising the power. It is, therefore, probable that an attempt will be made by first mortgagees to prevent the operation of sub-s. (2) in favour of subsequent mortgagees. It is not certain (see note to sub-s. 13, *infra*) that a provision excluding the section, contained in a prior mortgage deed, will, in the absence of a similar provision in a subsequent mortgage deed, prevent the subsequent mortgagee from exercising the power; and it may in many cases be desirable for the first mortgagee to insert in his deed a covenant by the mortgagor that he will not mortgage the equity of redemption without inserting such a provision into the subsequent mortgage deed.

Sub-s. (2) removes the inconvenience, that an ordinary lease

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granted by a mortgagee without the concurrence of the mortgagor does not bind the mortgagor's estate after redemption; but this would be equally well met by inserting in the mortgage deed a proper power of leasing; and the express powers formerly used seem to be preferable to the power conferred by the Act. But express powers of leasing were not very commonly inserted in mortgages. This fact points to the conclusion, that the want of such a power was not in practice found to be very inconvenient.

Under the practice before the Act, the power of leasing, when it was inserted, usually enabled the mortgagee to grant leases when not in possession. In this respect, the power conferred by the Act seems to be more equitable towards the mortgagor. When the mortgagor is in actual occupation of the mortgaged property, the mortgagee should always be made to enter into actual possession before granting leases.

The mortgagee's power of distress for rent reserved by a lease granted by him while in possession to the mortgagor, is not within the provisions of s. 6 of the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31; but in order to come within the proviso at the end of that section, the demise must have been made by the mortgagee while in actual possession. (*Re Willis, Ex parte Kennedy*, 21 Q. B. D. 384.) Attornment clauses in mortgages seem to be useless, if not actually pernicious. (1) The power of distress cannot be exercised so as to be good against a trustee in bankruptcy unless the mortgage has been registered under the Bills of Sale Act, 1878; (2) it is possible, notwithstanding some expressions used in *Hall* v. *Comfort*, 18 Q. B. D. 11, that, so far as the power of distress is concerned, such clauses are absolutely void as not being in the form prescribed by the Bills of Sale Act, 1882; and (3) such clauses may possibly entail upon a mortgagee, to the extent of the amount of the rent, the liabilities of a mortgagee in possession: see *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, at p. 353; *Ex parte Punnett, Re Kitchin*, 16 Ch. D. 226, at p. 235; which are scarcely disposed of by the decision of Bacon, V.-C., in *Stanley* v. *Grundy*, 22 Ch. D. 478. The decision in *Hall* v. *Comfort, supra*, appears to be correct; but the judges appear to have exhibited the most astonishing confusion between an attornment, regarded as a foundation for an action of ejectment, and the same thing regarded as a licence to seize chattels under a distress. For some valuable remarks upon the subject of attornment clauses in mortgages, see Key & Elphinstone, Conv. Prec. 2nd ed. vol. 2, p. 52.

As to the effect of this section upon incumbrances created before the commencement of the Act, see note on sub-s. (16), *infra*.

As to leases granted under this section by a tenant for life of the equity of redemption, see note on the S. L. Act, 1882, s. 6, p. 198, *post*.

As to leases granted under the last-mentioned Act, when the tenant for life has incumbered his interest, see s. 50 of that Act, p. 274, *post*.

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(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

When a tenant for life mortgages his life interest, the mortgagee on going into possession will acquire power under this section to grant leases for twenty-one or ninety-nine years, but only subject to the qualification, *if the mortgagor shall so long live.* As to the question, whether a lease so made would be valid against a lessee claiming under a subsequent lease made by the same tenant for life in exercise of his statutory powers, see note on s. 50 of the S. L. Act, 1882, p. 274, *post.*

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

Every lease made under this section must be held to take effect so that all rights and liabilities thereunder shall be incident to and shall bind the reversion to the same extent as if it had been made by the mortgagor and all the incumbrancers.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

As to the meaning of "best rent," see Woodfall, Landl. and Ten. 12th ed. pp. 359, 360; Sugden on Powers, cap. 10, sect. 4; Chance on Powers, 2285 *et seq.*; Farwell on Powers, cap. 17, sect. 9. See also note on the S. L. Act, 1882, s. 7, sub-s. (2), p. 200, *post.*

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee

and all persons deriving title under him, be sufficient evidence. C. A. 1881, Sect. 18.

Where the mortgage comprises an undivided share of land (see s. 2, sub-s. ii., p. 2, *ante*) the mortgagor, in order to comply with this provision, must either stipulate with his co-lessors for delivery to him of the counterpart, or else with the lessee for the execution of a duplicate counterpart.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

The words, "within not more than five years from the date of the lease," and "within that time," appear to refer only to agreements to build in the future, and not to works completed in the past. But upon this interpretation it might be open to a mortgagor to grant a lease in consideration of buildings already erected at any distance of time, and possibly at "prairie value." It is probable that, in order to avoid this result, a forced construction will be put by the Courts upon the language of this subsection. Perhaps the words "having erected" may be taken to mean "having erected under the contract for the lease." Compare the similar provision in the S. L. Act, 1882, s. 8, p. 201, *post*, in which no limit of time is assigned.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

The effect of failure to deliver a counterpart is not to invalidate the lease, but by virtue of s. 20, sub-s. (iii.), p. 71, *post*, to cause the power of sale to become immediately exerciseable. It is not

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quite clear whether "priority" means priority in point of time or priority in point of right, which things do not always coincide. The lessee could not, in the absence of special stipulation, be compelled to execute more than one counterpart. If, therefore, the mortgagor feels any doubt as to the priority of his incumbrancers, he might, in his contract for the lease, do well to stipulate for as many duplicate counterparts as he may think requisite. The question might arise, for example, in a register county, in a case where a first mortgagee has neglected to register his charge until after registration by a second.

Delivery of a counterpart cannot be an acknowledgment of a mortgagee's right within the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, if for no other reason, because the counterpart would not be a writing signed by the mortgagor.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

This sub-section can hardly be intended to be confined to parties to the contract, because the contract could be enforced as between them without it. This consideration suggests the following questions:—

1. Can an intending lessee enforce a mortgagor's contract against a mortgagee who has taken possession after the contract?
2. Can a mortgagee, who has meanwhile taken possession, enforce his mortgagor's contract against the intending lessee?
3. Can a mortgagee, out of possession, enforce the contract of his mortgagor in possession, even against the will of the mortgagor?
4. Can a mortgagor, out of possession, enforce the contract of his mortgagee in possession even against the will of the mortgagee?

There seems to be nothing in the language of this sub-section to exclude any of these cases; and, if so, the mortgagor or mortgagee in possession cannot release his own contract without the consent of the mortgagee or mortgagor out of possession respectively. The forms of judgment appropriate to these cases, especially to the first two, may perhaps afford a field for some ingenuity. As the mortgagee and mortgagor can only grant leases while themselves actually in possession, a change in possession would apparently effect a change in the person liable to grant the lease, and A. may be compelled by B. specifically to perform a contract made between C. and B., although he is not C.'s representative in title.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise

in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained. C. A. 1881, Sect. 18.

A lessee treating for a lease of mortgaged property, upon which he intends to lay out money, will do wisely to make inquiry of the mortgagor and of all the incumbrancers whether there is any "expression" of a "contrary intention" contained in any "writing" extraneous to the mortgage deed.

It is by no means clear that the expression of an intention to exclude the operation of the section contained in a mortgage deed will operate to prevent a subsequent mortgagee, in whose case no such intention happens to be expressed, from exercising the power. The language of the Act rather suggests that the effect of the expression of a contrary intention is confined to the deed in which it occurs. See note on sub-s. (2), *supra*.

The words "by the mortgagor and mortgagee" seem to be superfluous unless the mortgagor and mortgagee must both execute the mortgage deed or other writing so as to express a contrary intention. The case is not analogous to that of a person accepting and acting upon a deed, because the person to take advantage of a failure to exclude the power of leasing would be the lessee, and not either of the parties to the deed or other writing.

And it is to be remarked that in the case of *Witham* v. *Vane*, the Court of Appeal held that, "it is impossible to say that a covenant not executed is the same as a covenant executed, because the person who ought to have executed it, or who was intended to have executed it, takes the estate." The judgment of the Court of Appeal was afterwards reversed by the House of Lords, but upon the ground that there was sufficient evidence of the execution of the covenant, not upon the ground that it would have been binding though not executed. This case is reported in Dom. Proc., Challis, R. P. 341.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

This sub-section would apparently authorize the insertion of a power to grant mining leases.

Its language, taken in connection with sub-s. (15), *infra*, suggests an alarming possibility. If a *puisne* mortgage should contain a power to lease taking a premium, such premium to be

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applied in reduction of the *puisne* mortgage debt, such lease will apparently bind all prior incumbrancers, since such an exercise of the power would have bound them if the power had been conferred by the Act. (Sub-s. 2, *supra*.) See, however, note on sub-s. (16), *infra*.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

The section therefore contains nothing to authorize a lease of copyholds (without licence) in manors where there is no custom to lease without licence.

(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

This sub-section not only prevents the power of leasing from being extended to the case of a mortgage made before the commencement of the Act, except by special agreement between the parties, but, although its language is far from clear, it will probably be held to restrict the words "every incumbrancer," in sub-s. (1), and "all prior incumbrancers," in sub-s. (2), *supra*, to incumbrancers whose charges were created after the commencement of the Act.

The sub-section seems designed to leave a mortgagee whose rights accrued before the commencement of the Act in the same position as if the Act had not been passed.

It was held by North, J., that in a mortgage made after the Act, in pursuance of a contract entered into before the Act and stipulating that the mortgage should "contain all usual clauses," the mortgagee could not insist upon the exclusion of sub-s. (1), *supra*. (*Re Nugent and Riley's Contract*, W. N. 1883, p. 147; 49 L. T. 132.) This decision seems gratuitously to attribute a variable intention to the contracting parties.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far

as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting. C. A. 1881, Sect. 18.

The power of the mortgagor in possession, which this subsection seems to recognize, of making parol leases for three years, is not such a power as a mortgagee would always approve, and under some circumstances it ought to be excluded.

The words, "so far as circumstances admit," appear to exclude the necessity for a proviso for re-entry, and other inconsistent restrictions, from parol demises. (See *Reveley* v. *Thomas*, 32 Sol. Journ. 468, where, however, the point was not actually decided.)

Sale; Insurance; Receiver; Timber.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely): Sect. 19. Powers incident to estate or interest of mortgagee.

The powers contained in this section are in substitution for and are an enlargement of the corresponding powers contained in Part II. of the Trustees and Mortgagees (Lord Cranworth's) Act, 23 & 24 Vict. c. 145; which is repealed by s. 71, p. 153, *post*.

The principal changes which have been made are—

(1.) The present Act extends to all property, instead of being confined to "hereditaments of any tenure or any interest therein."

(2.) The time for the exercise of the powers after default is much shortened.

(3.) The power to insure arises immediately after execution of the mortgage deed, instead of being exerciseable under the same circumstances as the power of sale, and the amount of the insurance is now for the first time expressly limited. (See s. 23, sub-s. 1, p. 76, *post*.) The application of the insurance money, if received by the mortgagor, is for the first time defined. (Sect. 23, sub-s. 3, p. 77, *post*.) If received by the mortgagee, the old rules are still in force.

(4.) The power to appoint a receiver is now exerciseable only when the power of sale has arisen (s. 24, sub-s. 1, p. 78, *post*), instead of being exerciseable a year after the time appointed for payment of principal, or on default for six months in payment of interest, or on neglect to insure.

(5.) No restriction is now placed on the mortgagee's choice of a receiver. (Compare s. 17 of Lord Cranworth's Act.)

(6.) The power to cut timber is novel.

(7.) The power given by s. 15 of Lord Cranworth's Act to the mortgagee, to convey mortgaged property "for all the estate and interest therein which the mortgagor had power to dispose of," is superseded. See note on s. 21, sub-s. 7, p. 75, *post*.

If the mortgage is to several persons, the powers will enure

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by survivorship; if to a single mortgagee, to his personal representatives. Since not only the mortgage debt, but also the legal estate (see s. 30, p. 88, *post*), even though of inheritance, devolves on the personal representatives, these are the only persons deriving title under the original mortgagee. (See s. 2, sub-s. vi. p. 5, *ante*.)

It is conceived that a memorandum of deposit under seal, though not strictly a deed, will suffice to confer upon the equitable mortgagee the powers given by this section. But the right to exercise the power of sale does not necessarily infer power to convey the legal estate, if any. An equitable mortgagee cannot convey the legal estate. (*Re Hodson and Howe's Contract*, 35 Ch. D. 668.)

(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; and

As to mortgages, the money secured by which is repayable by instalments, see note on s. 20, sub-s. (i), p. 71, *post*.

It has been held that this power is not implied in a bill of sale subject to the provisions of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), because such implication would be superfluous. (*Re Morritt*, 18 Q. B. D. 222; *Watkins* v. *Evans*, *ibid.* 386; *Calvert* v. *Thomas*, 19 Q. B. D. 204.) It is difficult to reconcile these decisions with the express language of s. 2, sub-sects. (i.) and (vi.), pp. 2, 5, *ante;* and the point appears to have caused a considerable amount of dissension among the judges.

The power conferred by this clause will not enable a mortgagee to sell fixtures apart from the mortgaged lands. (*Batchelor* v. *Yates*, 38 Ch. D. 112.)

(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged

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property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and

These premiums are only a charge upon the property, and cannot be recovered from the mortgagor as a debt. A mortgage deed, therefore, should still contain the ordinary covenant for their repayment.

Before Lord Cranworth's Act, a prior mortgagee could not, as against subsequent mortgagees, add premiums paid by him to his security, unless the mortgage deed gave him express power in that behalf. (*Brook* v. *Stone*, 13 W. R. 401.) If the mortgage deed contained a covenant to insure on the part of the mortgagor, but gave no power to the mortgagee, the premiums might be charged against the mortgagor, but not against subsequent mortgagees. But premiums were sometimes allowed to a mortgagee in possession, as "just allowances," in taking the accounts against him.

(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and

Although a mortgagee can appoint a receiver under this section, the Court will not refuse to appoint one when an action is pending. (*Tillett* v. *Nixon*, 25 Ch. D. 238.) But after order for foreclosure absolute, the Court will not appoint a receiver, even though the conveyance remains to be settled by the judge. (*Wills* v. *Luff*, 38 Ch. D. 197.)

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

It may in many cases be desirable for the mortgagor to exclude the power of cutting timber, if he can.

As to cutting timber by a mortgagor in possession, see *Farrant* v. *Lovel*, 3 Atk. 723; *Humphreys* v. *Harrison*, 1 Jac. & W. 581; *King* v. *Smith*, 2 Ha. 239; *Hampton* v. *Hodges*, 8 Ves. 105; *Hippesley* v. *Spencer*, 5 Madd. 422. The principle appears to be, that a mortgagor in possession may fell timber, if the security is

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ample, and the onus of proof that it is insufficient will lie upon the mortgagee seeking to restrain him.

As to cutting timber by a mortgagee, in possession under a mortgage prior to this Act, see *Withrington* v. *Banks*, Sel. Ch. Ca. 30, where it was laid down that a mortgagee in possession will not be allowed to fell timber, unless the security is shown to be defective. The same principle applies to the opening of mines. (See *Millett* v. *Davey*, 31 Beav. 470.)

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

It is not at all clear that an express power contained in the mortgage deed, without any reference to the Act, would come within this sub-section, so as to "operate in like manner," &c. Express powers should therefore either be absolutely complete within themselves, or they should be declared to be "provisions of the Act. . . . varied or extended by the mortgage deed."

It is conceived that the insertion of an express power will not of itself amount to the expression of a "contrary intention" within the meaning of the next following sub-section.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

The section seems to apply to a legal mortgage executed after the commencement of the Act, in pursuance of a contract entered into before the commencement.

Sect. 20. Regulation of exercise of power of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage

money, or of part thereof, for three months after such service; or

As to regulations made by the Act respecting notice, see s. 67, p. 149, *post*.

Notice to one of several tenants in common or joint tenants will suffice as to the whole. It may be doubted whether the enactment in sub-s. (i.) can be safely relied upon for any other purpose.

There is, perhaps, no strong reason why the phrase "several mortgagors" should not apply to several mortgagors having different interests in the property, *e. g.*, a tenant for life and remainderman; but in such a case it will be more prudent before exercising the statutory power to give notice to all.

Although the word "mortgagor" includes a subsequent mortgagee (s. 2, sub-s. vi., p. 5, *ante*), it does not follow that the phrase "several mortgagors" includes the mortgagor proper, and his successive assigns, as forming one class. It will be prudent for a mortgagee to give notice both to the mortgagor and to all subsequent incumbrancers of whose charges he has received notice. (See *Hoole* v. *Smith*, 17 Ch. D. 434.) If notice to one subsequent incumbrancer would suffice, there is nothing in the Act to give a prior claim to the earliest in date.

Where the mortgage money is repayable by instalments, the deed should provide that the statutory power shall become exerciseable within a specified time after the non-payment of any instalment, unless the deed contains a provision, that on default in payment of any instalment the whole of the remaining money shall become due. (See s. 19, sub-s. 2.)

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

It is clear that, on a mortgage of leaseholds by assignment, in which the mortgagor assigns "as beneficial owner," nonpayment of the rent reserved by the lease would be a breach of "a provision contained in the Act, and on the part of the mortgagor"; and it is conceived that the same doctrine will be held to apply also to mortgages by demise, though the language of s. 7, sub-s. (1), (D.), p. 30, *ante*, is not well adapted to include the latter.

The operation of this section may for practical purposes be varied without sacrificing the statutory power of sale by a decla-

C. A. 1881, Sect. 20. ration embodying the agreed terms of variation. (See s. 19, sub-s. 2, p. 70, *ante*.)

Sect. 21. Conveyance, receipt, &c. on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

An equitable mortgagee cannot convey the legal estate. (*Re Hodson and Howe's Contract*, 35 Ch. D. 668.)

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

If the purchaser has notice of an irregularity which is such that it cannot have been waived by the mortgagor, he cannot safely purchase from the mortgagee, without requiring proof that all the persons interested have waived the irregularity. (*Selwyn* v. *Garfit*, 38 Ch. D. 273.) That case is a decision upon an express clause contained in a mortgage; but it is conceived that the same principle is applicable to this sub-section, although its language is somewhat stronger. Cotton, L. J., seems to have thought, that notice of an irregularity throws upon the purchaser the duty of making inquiries which he otherwise might safely have omitted; while Bowen, L. J., seems to have thought that a waiver might perhaps, without inquiry, be presumed as against the mortgagor, but not as against subsequent incumbrancers. See also note on s. 22, sub-s. (2), p. 76, *post*.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject,

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if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

The question, whether the relation of trustee and *cestui que trust* is established between mortgagee and mortgagor, is important, because no claim of a *cestui que trust* against his trustee for any property held on an *express* trust, is liable to be barred by the Statutes of Limitation. (Jud. Act, 1873, s. 25, sub-s. 2.) For the present purpose, this rule seems not to be altered by the Trustee Act, 1888, s. 8, p. 319, *post*. The words *in trust*, occurring in this sub-section, seem to make the mortgagee an express trustee of the surplus sale moneys. He would be an *implied* trustee on any exercise of a power of sale, without the occurrence of words expressing a trust. (*Matthison* v. *Clarke*, 3 Drew. 3.) In *Kirkwood* v. *Thompson*, 2 H. & M. 392 (affd. 2 De G. J. & S. 613), Wood, V.-C., said that he saw no difference between the case of an ordinary mortgage and that of a trust for sale; and the Court of Appeal, in *Locking* v. *Parker*, L. R. 8 Ch. 30, took a similar view. But those cases did not decide that a trust can be express without being expressed.

The last-cited case shows (*ubi supra*, at p. 40) that, if words amounting to an expression of trust occur in the mortgage deed, the mortgagee will be an express trustee of the surplus sale moneys. (See also *Lake* v. *Bell*, 34 Ch. D. 462.)

In *Banner* v. *Berridge*, 18 Ch. D. 254, at p. 260, Kay, J., drew a distinction between an ordinary power of sale contained in a mortgage and a statutory power, such as that conferred by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which merely gives a power to sell without saying anything about the destination of the purchase-money.

As to the meaning of the phrase, "express trust," see *Banner* v. *Berridge*, *ubi supra*, at pp. 262—265, and p. 269.

A mortgagee is to some extent a trustee, though not an express trustee, for the mortgagor and persons claiming under him in respect to the following matters:—

1. If he is in possession, he is a trustee in respect of the surplus rents and profits. (*Matthison* v. *Clarke*, *supra*.)

2. If he exercises a power of sale he is a trustee, or in the nature of a trustee, of the surplus sale moneys.

With respect to any policy moneys received by the mortgagee under a policy of assurance, in excess of the amount due under

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the mortgage, it does not appear that any such relation exists. (See *Dobson* v. *Land*, 8 Ha. 216, at p. 220.)

3. After repayment of the mortgage money, but before re-conveyance. Since the trust is not express, the mortgagor can obtain a possessory title, and the legal estate of the mortgagee out of possession can be extinguished by the operation of the Statute of Limitations. (*Sands to Thompson*, 22 Ch. D. 614.)

If the persons entitled to the surplus sale moneys cannot be ascertained, it is the duty of the mortgagee to invest the surplus. (*Charles* v. *Jones*, 35 Ch. D. 544.)

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

It has sometimes been maintained in argument, but never decided, that an express power of sale is inconsistent with a right to foreclose. (See *Slade* v. *Rigg*, 3 Ha. 35, at p. 36.)

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

The provisions of this section agree with those of a similar character commonly inserted in a mortgage deed. As regards the trusts of the ultimate balance of the purchase-money, they give the mortgagee no novel protection. As to the circumstances upon which depends the validity of a sale by a mortgagee under his power, see Fisher on Mortgages, para. 503 *et seq.*, 797 *et seq.*; Coote on Mortgages, 4th ed., p. 251; see also *Warner* v. *Jacob*, 20 Ch. D. 220.

As to a sale by a mortgagee free from prior incumbrances, which is referred to in sub-s. (3), *supra*, see s. 5, p. 15, *ante*.

Sub-s. (1), *supra*, supersedes the eccentric provision in s. 15 of Lord Cranworth's Act, which purported to enable a mortgagee

to vest in a purchaser the property sold (not being copyhold) for all the estate and interest therein which *the person who created the charge* had power to dispose of. That provision was probably designed to dispense with the need for getting in outstanding legal estates, and the last days of the term when leaseholds were mortgaged by way of demise, as to which see *Hiatt* v. *Hillman*, 19 W. R. 694, cited 35 Ch. D. 669; but its language was not restricted to such cases, and for all that appeared on its face a mortgagee entitled only to a term of years might have sold the reversion in fee simple if vested in the mortgagor, even though that reversion were not the immediate reversion upon the mortgagee's term, but separated from it by an intervening particular estate. North, J., has held that under it an equitable mortgagee might convey the legal estate. (*Re Solomon and Meager's Contract*, W. N. 1889, p. 33.) Mortgages of leaseholds by demise should provide, that after a sale the mortgagor shall hold the superior term in trust for the purchaser.

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22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

Sect. 22. Mortgagee's receipts, discharges, &c.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

The power to give a receipt for "securities" is new, and will enable the mortgagee to give receipts for *choses in action* on which he has a charge.

If a mortgage debt and an estate of inheritance or *pur autre vie*, mortgaged to secure the same, are specifically bequeathed and devised, the devise of the estate will not take effect (see s. 30, p. 88, *post*), but it will pass to the testator's legal personal representatives. But, the debt being a proper subject of bequest, the legatee may perhaps be held to be the person "deriving title under the original mortgagee" (see s. 2, sub-s. vi., p. 5, *ante*), and, as such, to be the proper person to give

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the receipt. Until, however, the point is decided, it will be well for the mortgagor, discharging the debt and seeking a re-conveyance, to require the receipt to be given both by the legatee and by the executor, unless the latter shall have previously conveyed the estate to the former, or shall have authorized the legatee to receive the money.

As to a mortgagee's power to make a title after the debt is alleged to have been satisfied, see *Dicker* v. *Angerstein*, 3 Ch. D. 600. In that case stress was laid upon the wording of the deed. The second clause of sub-s. (1), *supra*, seems sufficient to protect a *bonâ fide* purchaser. It is conceived, however, that a mortgagor who has discharged his debt could interfere to prevent a sale, and that a purchaser taking with actual notice that nothing is due under the mortgage would not be protected. In a case where a purchaser had actual notice, before the contract for sale, that the principal and interest had been tendered, the sale (made under an express power contained in the deed) was set aside. (*Jenkins* v. *Jones*, 2 Giff. 99.) See also note on s. 21, sub-s. (2), p. 72, *supra*.

Sect. 23. Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two-third parts of the amount that would be required, in case of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

It is conceived that the onus of proving that the insurance is kept up would be thrown upon the mortgagor, and that he would therefore be bound to produce the receipts for premiums.

It seems to follow that if, on making inquiry, the mortgagee obtains no sufficient evidence that a proper insurance has been effected and is kept on foot, he may himself insure under this sub-section; and his rights will not be affected by the fact, if it should so turn out, that the mortgagor has kept on foot an insurance without his knowledge. But it does not appear that the mortgagor is bound to volunteer notice of the insurance, or of the payment of the premiums; and since, in relation to a prior mortgagee, the word "mortgagor," by virtue of s. 2, sub-s. (vi.), *ante*, includes a *puisne* mortgagee (*Teevan* v. *Smith*,

20 Ch. D. 724), a mortgagee will do well before insuring to make inquiry of all subsequent mortgagees of whose charges he has received notice.

Mortgage deeds should still contain a covenant to insure to the requisite amount, and to produce the policy and receipts on demand; which, in the case of a mortgage for a term certain, should provide that the policy moneys shall be immediately applicable in discharge of all moneys secured by the mortgage, whether "due" within the meaning of sub-s. (4), *infra*, or not. See also, as to the form of such covenants, note on sect. 19, sub-s. (2), *ante*.

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

Since, in relation to a prior mortgagee, the word "mortgagor," by virtue of sect. 2, sub-s. (vi.), *ante*, includes a *puisne* mortgagee (*Teevan* v. *Smith*, *supra*), it seems to follow that any *puisne* mortgagee may deprive all the mortgagees prior to him of their power to insure under the Act.

(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

It is only under the Act, or by virtue of special contract, that a mortgagee of any property not included in the description of "houses or other buildings" (as to which see 14 Geo. 3, c. 78, s. 83, cited in note on sub-s. 4, *infra*) can require the policy moneys to be applied in making good the damage. Even a covenant to insure contained in the mortgage deed was not enough, previously to this sub-section, in the absence of a stipulation that the policy moneys should be so applied. (*Lees* v. *Whiteley*, L. R. 2 Eq. 143; which was approved by a majority of the Court of Appeal in *Rayner* v. *Preston*, 18 Ch. D. 1.) Where the mortgage deed contains no covenant to insure, the mortgagee cannot require the money paid under any policy effected by the mortgagor to be so applied.

In *Poole* v. *Adams*, 12 W. R. 683, it was held that a purchaser of buildings was not entitled to the benefit of an existing insurance, in the absence of any stipulation in his contract; and the principle seems equally applicable to the case of a mortgagee. It is true that in *Garden* v. *Ingram*, 23 L. J. Ch. 478, a mortgagee was held entitled to the benefit of a policy existing at the date of the mortgage deed; but that decision was based on the ground that the property was held under a lease which contained an express provision that the policy moneys should be laid out

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in reinstating the premises. (See *Lees* v. *Whiteley* and *Rayner* v. *Preston, supra.*) But it is to be remarked that, if a vendor should receive the policy moneys, they can be recovered back from him by the office, unless he makes a corresponding allowance out of the purchase-money to the purchaser. (*Castellain* v. *Preston*, 11 Q. B. D. 380.)

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

When the mortgage money is not to be called in for a term certain, it does not seem to be "due" until the expiration of the term. Therefore, under such circumstances this sub-section would not, in the absence of special stipulation, enable the mortgagee to claim the policy moneys.

It is probable that the phrase, "on an insurance," will be held to be equivalent to the phrase, "on an insurance effected under the mortgage deed or under this Act," as in sub-s. (3), *supra*.

By 14 Geo. 3, c. 78, s. 83, the insurance office is authorized and required, upon the request of any person interested in any houses or other buildings burnt down or damaged by fire, or upon any grounds of suspicion, to cause the insurance money to be laid out towards reinstating the property, unless the parties claiming the money give sufficient security so to lay it out, or unless the money be disposed among all the contending parties to the satisfaction of the office. This provision is preserved by 7 & 8 Vict. c. 84, sched. (A.); 18 & 19 Vict. c. 122, s. 109; 28 & 29 Vict. c. 90, s. 34. It is of general, not of local, application. It does not extend to moneys for which trade fixtures owned by the tenant are insured by him. (*Ex parte Gorely*, 4 De G. J. & S. 477.)

Sect. 24. Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

It will still be necessary expressly to provide for the appointment of a receiver, when it is desired either to exercise the power before the mortgage money has become due, or before the time at which the statutory power of sale would become exerciseable; as to which, see s. 20, p. 70, *ante*. If the mortgage money is payable by instalments, the deed should provide that the power may be exercised upon default in payment of any instalment.

This sub-section seems to apply to any modified power of sale introduced into the mortgage deed by virtue of s. 19, sub-s. (2), p. 70, *ante*.

Since a mortgagee who has once gone into possession cannot go out of possession without the assent of the mortgagor, but remains liable to account from the date of taking possession (as to which see *National Bank of Australasia* v. *United, &c. Co.*, 4 App. Cas. 391), it follows that, after taking possession, he cannot appoint a receiver under this section, and any receiver appointed by him will be his own agent.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

It is presumed that the provision, "the mortgagor shall be solely responsible," only means that the mortgagee shall not, and that it will not, by virtue of s. 2, sub-s. (vi.) p. 5, *ante*, enable a prior mortgagee to recover damages from a subsequent mortgagee.

When a receiver has been appointed, the Court will restrain the mortgagor from distraining for rent, even though the receiver is negligent. (*Bayly* v. *Went*, W. N. 1884, p. 197; 51 L. T. 764.) A receiver appointed under the power formerly usual in mortgage deeds was for all purposes the agent of the mortgagor. (*Jefferys* v. *Dickson*, L. R. 1 Ch. 183. See also *Law* v. *Glenn*, L. R. 2 Ch. 634, at p. 641.)

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

Instead of the words, "in the name either of the mortgagor or of the mortgagee," the corresponding section (s. 19) of Lord Cranworth's Act had the words, "in the name either of the person *entitled to the property subject to* the charge, or of the person *entitled to the money secured by* the charge." In some cases the mortgagee is only a trustee; where, for example, a term is created subject to a proviso for redemption to secure moneys to be paid in specified ways to specified persons. In such cases no distress could have been made, under the power conferred by Lord Cranworth's Act, in the name of the mortgagee, *i. e.*, the person in whom the term was vested. In many cases, such termor might distrain at common law; viz., where he has, by virtue of his term, a legal reversion (whether by estoppel or in interest) upon the estate of the occupying tenant. But, by making a

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distress at common law, he would constitute himself mortgagee in possession.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

C. A. 1881, Sect. 24.

The power to appoint a receiver benefits the mortgagee by practically enabling him to obtain most of the advantages of taking possession without incurring its liabilities.

The receiver is defined by s. 19, p. 67, *ante*, to be a "receiver of the income of the mortgaged property." The Act gives him no power of leasing. Since he is expressly made the agent of the mortgagor (sub-s. 2, *supra*), it is submitted that his appointment does not oust the mortgagor from possession, and that the mortgagor solely retains the power conferred by s. 18, p. 59, *ante*, of making leases.

The foregoing power to pay the cost of repairs was not contained in the corresponding clauses of Lord Cranworth's Act.

Any mortgagee may appoint a receiver, but a receiver appointed by a *puisne* mortgagee will be liable to be ousted by one subsequently appointed by a prior incumbrancer.

Before the Judicature Act, 1873, s. 25, sub-s. (8), a legal mortgagee, or an equitable mortgagee having an express power to distrain, or the owner of a rent-charge, or the owner of a rent-seck, since he had a power to distrain by virtue of 4 Geo. 2, c. 28, s. 5, could not have obtained the appointment of a receiver by the Court.

Action respecting Mortgage.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

Sect. 25. Sale of mortgaged property in action for foreclosure, &c.

This sub-section refers only to redemption actions, while sub-s. (2), *infra*, refers also to foreclosure actions and to actions by *puisne* mortgagees to realize their security. Under this subsection, the order for sale appears to be a matter of right, but subject, so far as the Court thinks fit, to the precautionary restrictions specified in sub-s. (3), *infra*. (*Clarke* v. *Pannell*, 29 Sol. Journ. 147.) But in such a case, if the mortgagee opposed the sale, the Court would probably fix a reserved price sufficient to cover the mortgagee's claim. Under sub-s. (2), the making of the order seems to be wholly in the discretion of the Court.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person

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interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

In *Wade* v. *Wilson* (*No.* 1), 22 Ch. D. 235, where the mortgagor had not appeared, and a *puisne* mortgagee had made default in pleading, the mortgagee asked for an immediate sale; but the Court ordered that an account should first be taken of what was due, and that, after such account had been certified, the property, or so much as would suffice to satisfy the plaintiff's claim, should be sold.

In an action in which only foreclosure was claimed, the Court refused to order a sale in the absence of the mortgagor, who had no notice of the application for a sale. (*South Western District Bank* v. *Turner*, 31 W. R. 113.)

Before a sale is ordered under this section upon the application of the mortgagor alone, he must deposit in Court a sufficient sum to protect the mortgagee against the risk of an abortive sale. (*Lingard-Moncke* v. *Jenkins*, L. J. Notes, 1883, p. 18. See also note, p. 84, *post.*)

An equitable mortgagee, without a memorandum of deposit, or an agreement to execute a legal mortgage, may have an order for sale instead of foreclosure, under this sub-section. (*Oldham* v. *Stringer*, W. N. 1884, p. 235; 33 W. R. 251.) In that case the defendant had failed to appear to the writ.

In *Charlewood* v. *Hammer*, 28 Sol. Journ. 710, the defendant had appeared to the writ, but delivered no statement of claim. On a motion for judgment in default of pleading, the plaintiff obtained leave to sell unless the defendant redeemed within ten days after the chief clerk's certificate. But in that case it appeared that the security was clearly deficient.

In a foreclosure action it appeared that the security was insufficient at the date of the issue of the writ; and the Court declined to order a sale at the instance of the persons entitled to redeem, who asked for a sale on the ground that the property had subsequently increased in value. (*Merchant Banking Co. of London* v. *London, &c. Bank*, W. N. 1886, p. 5; 55 L. J. Ch. 479.)

If an order for sale is made under this sub-section upon the application of the mortgagee, a certain time will be allowed for redemption. In *Wade* v. *Wilson*, *supra*, one month, in *Green* v. *Biggs*, W. N. 1885, p. 128, 52 L. T. 680, and in *Jones* v. *Harris*, W. N. 1887, p. 10, 52 L. T. 884, three months were allowed.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them. C. A. 1881, Sect. 25.

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

In *General Credit, &c. Company* v. *Glegg*, 22 Ch. D. 549, foreclosure was ordered with a single time for redemption as against the mortgagor and the *puisne* mortgagees (as in *Bartlett* v. *Rees*, L. R. 12 Eq. 395) without determining the priorities *inter se* of the *puisne* mortgagees, but without prejudice to their respective rights.

In *Smith* v. *Olding*, 25 Ch. D. 462, a single time for redemption was given, where the second mortgagee had postponed his own security and had become surety for the mortgagor, and neither defendant appeared. See also *Doble* v. *Manley*, 28 Ch. D. 664; *Lewis* v. *Aberdare, &c. Co.*, W. N. 1884, p. 116, 53 L. J. Ch. 741. The rule now is, that only one period will be given where the persons entitled to redeem do not appear and ask for successive periods.

A further time will be given at the request of a subsequent incumbrancer, but not of the mortgagor, where there is no conflict as to priorities. (*Platt* v. *Mendel*, 27 Ch. D. 246.)

(5.) This section applies to actions brought either before or after the commencement of this Act.

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed. 15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland.

The provisions of s. 5, p. 15, *ante*, of course apply to sales ordered under this section after the commencement of the Act.

This section is in substitution for and extension of 15 & 16 Vict. c. 86, s. 48, the enactment repealed by sub-s. (6).

"It shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be 15 & 16 Vict. c. 86, s. 48.

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made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request."

An order for sale may be made upon interlocutory application before the trial (*Woolley* v. *Colman*, 21 Ch. D. 169); and at any time up to foreclosure absolute (*Union Bank of London* v. *Ingram*, 20 Ch. D. 463).

In *Weston* v. *Davidson*, W. N. 1882, p. 28, an order for sale was made at the time of moving for foreclosure absolute; but the defendant asking for the sale was ordered to pay into Court a sum sufficient to meet the expenses of the sale.

An order for sale will not be made in an action brought by one of two tenants in common of land for a partition or sale, against the wish of the other tenant in common, to whom he has mortgaged his own share. (*Gibbs* v. *Haydon*, 30 W. R. 726.)

Under the old practice,—

(1.) An equitable mortgagee by deposit without memorandum was not entitled to a sale, but only to foreclosure (*Samble* v. *Wilson*, 5 N. R. 395); *secus*, if he had a memorandum containing an agreement to execute a legal mortgage (*York Union Banking Co.* v. *Artley*, 11 Ch. D. 205). But see now, *Oldham* v. *Stringer*, W. N. 1884, p. 235; 33 W. R. 251.

(2.) A sale would not be ordered, even at the request of the legal mortgagee, except where it would be for the benefit of all parties (*Hurst* v. *Hurst*, 16 Beav. 372); or where special circumstances rendered it desirable (*Robert* v. *Price*, 1 W. R. 303).

Under the old practice the conduct of the sale, even when ordered at the instance of a subsequent mortgagee, would be given to the first mortgagee if expense could be thereby saved. (*Hewitt* v. *Nanson*, 7 W. R. 5.) But where the security is ample, the Court is inclined to give the conduct of the sale to "the parties interested in obtaining the largest price, rather than to those who are only interested in obtaining what is sufficient to cover their security." (*Per* Chitty, J., in *Manchester and Salford Bank* v. *Scowcroft*, 27 Sol. Journ. 517. See also *Woolley* v. *Colman*, *supra*; *Davies* v. *Wright*, 32 Ch. D. 220.) But there is no absolute rule to this effect. (See *Christy* v. *Van Tromp*, W. N. 1886, p. 111.) When an order for sale is made against the wish of the first mortgagee, or the conduct of the sale is given to any other party, a sum of money must be deposited in Court sufficient to cover the expenses of an abortive attempt to sell, and a reserve bidding will be fixed sufficient to satisfy what is due under the first mortgage. (See *Whitbread* v. *Roberts*, 28 L. J. Ch. 431; S. C. *sub nom. Whitfield* v. *Roberts*, 5 Jur. N. S. 113; *Manchester and Salford Bank* v. *Scowcroft*, *supra*.)

See further, as to sales in foreclosure actions, Fisher on Mortgages, par. 832; Coote on Mortgages, 4th ed. pp. 992, 999;

Seton on Decrees, Part IV., Ch. XXV., sect. 1 (4th ed. p. 1046). C. A. 1881, Sect. 25.

V.—Statutory Mortgage.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto. Sect. 26. Form of statutory mortgage in schedule.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall reconvey the mortgaged property to the mortgagor, or as he shall direct.

It is the general opinion that the statutory forms mentioned in this and the following sections ought only to be used (if ever) in simple cases and for securing small amounts.

A mortgagor, in cases where these forms are adopted, will have the right to require a transfer instead of a re-conveyance. The observations upon the incidents to mortgages appearing

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elsewhere in these notes will apply generally to statutory mortgages.

Sect. 59, sub-s. (2), p. 136, *post*, provides that the covenants implied in a statutory mortgage, by virtue of this section, and of s. 7, p. 24, *ante*, shall bind the realty as well as the personalty of the mortgagor.

Sect. 27. Forms of statutory transfer of mortgage in schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on

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the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

With regard to form (C.), it is to be observed, that the mortgagor is expressed to convey only *as beneficial owner*, and not *as mortgagor*. (See s. 26, sub-s. 2, *ante*.) Therefore this form implies no covenant to pay the further advances, but only transfers the benefit of the existing covenant to pay the old debt and interest. The form should be "varied" by inserting the words "as mortgagor and" before the words "as beneficial owner," whenever a further advance is made.

The same remark applies to all cases in which the "mortgagor" is not the original mortgagor, and it is desired by the transferee to obtain a new covenant for payment of the old debt.

The insertion of a new proviso for redemption does not of itself constitute the document a new mortgage. (See *Barham* v. *Earl of Thanet*, 3 My. & K. 607.) It is presumed that its implication will receive a similar construction.

In a deed of transfer of mortgage, the insertion of a new proviso for redemption does not prevent the deed from being a "transfer" within the meaning of the Stamp Act, 1870. (See *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 270.)

Where a further advance is included, mortgage duty will be payable on the new debt, and transfer duty on the old. (*Ibid.*)

Sect. 28. Implied covenants, joint and several.

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a cove-

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nant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Sect. 29. Form of reconveyance of statutory mortgage in schedule.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

VI.—Trust and Mortgage Estates on Death.

Sect. 30. Devolution of trust and mortgage estates on death.

30.—(1.) Where an estate or interest of inheritance or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

This section renders superfluous and inoperative the devise of trust and mortgage estates formerly inserted in wills. It has been suggested, on high authority, that if a testator wishes that his

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trust estates shall go to particular persons, he can appoint them executors for that special purpose. (Wolstenholme & Turner, Conv. Acts, 3rd ed. p. 79; 4th ed. p. 83.) If this view is correct, the operation of the statute, so far as it renders devolution compulsory, can be evaded by the simple plan of calling a devisee a "special executor." It does not, however, seem clear that a special executor would be held to be a "personal representative" within the section; unless, perhaps, he were not an executor of a special fund, but an executor of property within the limits of one jurisdiction, there being other executors of property outside those limits. (Finch, Law, p. 169.)

Though this section vests the mortgaged estate in the personal representatives of a sole mortgagee, it is silent about the debt for which it is a security. A doubt may arise if the debt should happen to be specifically bequeathed. (See note to s. 22, p. 75, *ante*.) In such a case the legatee must obtain a conveyance from the "personal representatives." In case a "special executor" should have been appointed, in accordance with the above-mentioned suggestion, he also should join in the conveyance.

It seems that when there is no personal representative the freehold will be in abeyance. In such a case limited administration might be applied for, and it would probably, if the estate were insolvent, be restricted to the subject of the trust. (See *In the Goods of Prothero*, L. R. 3 P. & M. 209.)

The doubt expressed in the foregoing paragraph was referred to, but not solved, by Pearson, J., in *Re Pilling's Trusts*, 26 Ch. D. 432. The difficulty was evaded in *Re Rackstraw's Trusts*, W. N. 1885, p. 73, 33 W. R. 559, and *Re Williams' Trusts*, 36 Ch. D. 231, by ordering that the property should vest in the new trustees for all such estate and interest as was vested in the deceased trustee at the time of his death.

Now that estates of inheritance, vested in a trustee or mortgagee who dies solely seised, "devolve to and become vested in his personal representatives in like manner as if" they were chattels real, there seems no longer to be any strong reason why courts of probate should refuse to assume jurisdiction to grant administration of freeholds "devolving" in that manner, even though there should be no personalty to administer. If the view of Messrs. Wolstenholme and Turner is correct, that a testator can appoint an executor for the special purpose of administering his trust and mortgage estates, there can be no doubt that the Court could appoint an administrator for the same special purpose. But the authors have been informed that the officials of the Probate Division, in reply to an application, have expressed a doubt whether such limited administration would be granted. If the official view should be sustained, the proper course (unless, perhaps, in cases where the trust estate comprises leaseholds, or other chattels, besides freeholds, when application might be made for administration limited to the general trust estate) will be to apply to the Chancery Division for a vesting order.

The assignment of a term of years by one of several executors of a deceased lessee is valid (Dyer, 23 b, pl. 146); and one administrator stands in this respect on the same footing as one executor. (*Jacomb* v. *Harwood*, 2 Ves. sen. 265.) It would,

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therefore, seem probable that under this section one of several personal representatives can convey freehold trust estates or re-convey freehold mortgage estates.

An executor who acquires the legal estate under this section cannot exercise a power of sale, unless the power would have been exerciseable by the testator's heir if the estate had descended to him. (*Re Ingleby, &c. Co.*, 13 L. R. Ir. 326.)

It has been held by Kay, J., in *Re Hughes*, W. N. 1884, p. 53, and by North, J., in *Heslop* v. *Richmond*, 21 L. J. Notes, p. 29, that this section extends to copyholds. The decision of Bacon, V.-C., referred to in *Hall* v. *Bromley*, 35 Ch. D. 642, at p. 645, was to the same effect; but in the case itself of *Hall* v. *Bromley*, the question did not arise, because the executors had previously acquiesced in the decision of Bacon, V.-C., and had taken admittance. In *Re Mill's Trusts*, 37 Ch. D. 312, North, J., appears to have assumed that the section refers to copyholds. But it may well be doubted whether so grave an interference with the law of tenure should be imported by implication.

The Copyhold Act, 1887, 50 & 51 Vict. c. 73, s. 45, enacts as follows:—

> "The thirtieth section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust, or by way of mortgage."

This enactment does not extend to the case of a mortgagee or trustee who has obtained a surrender, but has died before admittance. Therefore the question, whether the present section originally applied to copyholds, is still capable of arising.

In *Re Mills' Trusts*, *supra*, North, J., held that, in the case of a person dying in the interval between the commencement of the present Act and the Copyhold Act above cited, the legal estate in copyholds was shifted, by the passing of the latter Act, from the personal representatives to the customary heir or devisee, but that any disposition of the copyholds made by the personal representatives before the passing of the Copyhold Act would have been valid. The case was re-argued (W. N. 1888, p. 155), when North, J., adhered to his former opinion, and his decision was sustained by the Court of Appeal (40 Ch. D. 14), but only so far as regards the exact point involved, and in such a way as to avoid any expression of opinion as to the effect upon copyholds of the present section, or, supposing them to be within it, as to the effect of the Copyhold Act, 1887. The principle of Mr. Justice North's view, as above stated, seems to be open to doubt. If it be granted that the present section applies to copyholds, there seems to be no reason why the title under it of the executor, especially when perfected by admittance, should be disturbed by the subsequent Copyhold Act. Any reasoning which would seem to import that conclusion, seems equally to be a reason for also disturbing the title of the assignee of the executor; and to attribute this kind of retrospective effect to Acts of Parliament would cause intolerable inconvenience.

As the section does not now apply to copyholds, the old rules as to the construction of devises, with regard to the inclusion or exclu-

sion of trust and mortgage estates, will, of course, apply to them. See, for example, *Re Franklyn's Mortgages*, W. N. 1888, p. 217.

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(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

37 & 38 Vict. c. 78.
38 & 39 Vict. c. 87.

Sect. 4 of the V. and P. Act, 1874, provided that the legal personal representative might convey the legal estate in mortgaged property. That section did not enable the personal representative to convey on a sale made under a power contained in the mortgage. (*Re White*, 51 L. J. Ch. 856.) Sect. 48 of the Land Transfer Act, 1875, 38 & 39 Vict. c. 87, repealed s. 5 of the V. and P. Act, 1874, which provided that a bare legal estate in fee simple outstanding in a trustee should vest in the executor or administrator, and enacted that the aforesaid provision should only apply where the trustee died intestate. Its repeal, of course, does not re-enact the section repealed by it.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.

VII.—Trustees and Executors.

Sect. 31. Appointment of new trustees, vesting of trust property, &c.

31.—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

This section will not authorize the other trustees to make an appointment in the place of a trustee who is an infant. (*Re Tallatire*, W. N. 1885, p. 191.)

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In the first sub-section the words "personal representatives of the last surviving or continuing trustee," include the executor of a sole trustee. (*Re Shafto's Trusts*, 29 Ch. D. 247.)

As to whether this section authorizes the appointment of trustees for purposes of the S. L. Act, 1882, see note on s. 38 of that Act, p. 259, *post*. As to trustees for purposes of s. 42 of the present Act, see note thereon, p. 110, *post*.

If one trustee, who also has a sole power of appointing new trustees, becomes lunatic, a trustee may be appointed in his place under this section. See *Re Elizabeth Blake*, W. N. 1887, p. 173; where, however, the appointment was made under s. 137 of the Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70.

It has been held that this section extends to a case in which a private Act incorporated the corresponding section of Lord Cranworth's Act, with the restriction, that every appointment must be made with the approval of the Court; and the power conferred by this section may now be exercised discharged from the restriction. (*Re Lloyd's Trusts*, W. N. 1888, p. 20.)

It appears that the donee of a power to appoint new trustees, who has an interest in the settled fund, may exercise the power after parting with his interest. (*Hardaker* v. *Moorhouse*, 26 Ch. D. 417.) It would, however, be better to obtain the assent of the assignees.

This section does not provide for the case of all the trustees appointed by a will dying in the testator's lifetime.

The persons empowered by this section to act may appoint new trustees, when the settlement confers an express power upon other persons, if the latter persons, though willing, are by reason of special circumstances unable to act. (*Re Sheppard's Settlement Trusts*, W. N. 1888, p. 234.)

(2.) On an appointment of a new trustee, the number of trustees may be increased.

The Court has power, under s. 32 of the Trustee Act, 1850, to increase the number of the trustees, although there may be no vacancy. (*Re Brackenbury's Trusts*, L. R. 10 Eq. 45.) But it does not appear that under the present section any appointment can be made without a vacancy. (See *Re Gregson's Trusts*, 34 Ch. D. 209.) Under s. 32, *post*, the number of trustees, if greater than two, may be decreased by voluntary retirement. The Court will not remove a trustee without appointing a successor (see note on the next section); nor on the appointment of new trustees will the Court reduce the number (see *Re Gardiner's Trusts*, 33 Ch. D. 590); unless, perhaps, under special circumstances (see *Re Fowler's Trusts*, W. N. 1886, p. 183). But there is nothing to prevent a person exercising the power given by this section from filling up less than the whole number of vacancies.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally

appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

New trustees are not fixed with notice of matters known to retiring trustees, not disclosed and not discoverable by reference to the documents relating to the trust; and it makes no difference whether the trust property does or does not vest in the new trustees. (*Hallows* v. *Lloyd*, 39 Ch. D. 686.)

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

A retiring trustee is not a necessary party to the appointment. (See *Re Norris, Allen* v. *Norris*, 27 Ch. D. 333.) If not willing to act, a retiring trustee is not included; and the onus of proving that he was willing to act lies upon the person raising the objection. (See *Re Coates to Parsons*, 34 Ch. D. 370.) If a trustee's conduct has amounted to a disclaimer, he cannot afterwards act, and cannot convey the legal estate. (*Re Birchall*, W. N. 1889, p. 31.)

It is a question whether this section enables the personal representative of a trustee, appointed by will and dying in the testator's lifetime, to appoint a new trustee in the place of the deceased trustee, or whether it merely enables a new trustee to be appointed in his place, without saying by whom he is to be appointed; in which latter case it would be necessary to apply to the Court. In *Re Ambler's Trusts*, 32 Sol. Journ. 541, Kay, J., appears to have inclined to the former view; but he followed the

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cases of *Re Orde*, 24 Ch. D. 271, *Re Lightbody's Trusts*, W. N. 1885, p. 3, 33 W. R. 452, where that view appears to have been taken for granted.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(8.) This section applies to trusts created either before or after the commencement of this Act.

This section for the first time provides by statute for the following cases:—

1. When a trustee "remains out of the United Kingdom for more than twelve months." This is, perhaps, less convenient than the provision in common use which enables a trustee to be superseded immediately on "going to reside abroad," but the one usefully supplements the other.

2. When all the trustees retire simultaneously. (See *Stones* v. *Rowton*, 17 Beav. 308.)

By sub-s. (1), *supra*, the continuing trustees can appoint, and by sub-s. (6) a retiring trustee can do what a continuing trustee can do, and there is nothing in the context in sub-s. (6) to limit the words "retiring trustee" to the singular number. See 13 & 14 Vict. c. 21 (Lord Brougham's Act).

3. When it is desired to increase or reduce the number of trustees.

In particular cases the wording of the instrument containing the power has been held to authorize such increase or reduction. In *Meinertzhagen* v. *Davis*, 1 Coll. 335, the appointment of three trustees in place of two, in *Re Breary*, W. N. 1873, p. 48, of two in place of one, and in *Re Pool Bathurst's Estate*, 2 Sm. & Giff. 169, of two in place of three, was upheld. In *Cunningham to Wilson*, W. N. 1877, p. 258, Jessel, M. R., said that he was not aware of any rule making it compulsory on the donees of a power when appointing new trustees to keep up the full number, except in the case of a charity, and that if a testator wished the number to be kept up he must expressly say so. This case was followed in *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138, in which the appointment of one trustee in the place of two, one of whom had disclaimed without acting, was upheld; but it seems to be at variance with *Earl of Lonsdale* v. *Beckett*, 4 De G. & Sm. 73, where the appointment, by a retiring trustee, of a sole trustee of an instrument by which three had originally been appointed, was held to be invalid; and its principle seems to be opposed to sub-s. (3), *supra*. The appointment of four trustees in the place of three was held bad in *Ex parte Davis*, 2 Y. & C. C. C. 468. (See also Lewin on Trusts, 7th ed. p. 563, 8th ed. p. 659; Chance on Powers, sect. 2568.)

The Court has repeatedly exercised a power analogous to that which is here conferred on persons having power to appoint.

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(See Lewin on Trusts, 8th ed. p. 661, and cases there cited; Morgan & Chute's Chancery Acts, 5th ed. p. 100.)

Under Lord Cranworth's Act, the "Court" was the Court of Chancery. The 28 & 29 Vict. c. 99, extended the jurisdiction to County Courts in certain cases.

The phrase "personal representatives" has probably been adopted in order to avoid doubts whether the word "executor" would include an executor who declines to prove or to act. (See *Earl of Granville* v. *McNeile*, 7 Ha. 156.)

For cases decided under the old law, see Lewin on Trusts; and as to the principles by which the Court is guided in selecting persons to be appointed trustees, see *Re Tempest*, L. R. 1 Ch. 485; and see Lewin on Trusts, and Morgan & Chute's Chancery Acts.

In ordinary cases, where the statutory power can be exercised, it is not proper to apply to the Court. (*Re John Gibbons' Trusts*, W. N. 1882, p. 12; 30 W. R. 287.) Such applications are liable to be dismissed with costs. (*Re Oakden's Trusts*, 26 Sol. Journ. 563.) But in a proper case the Court will exercise its jurisdiction to appoint trustees under the Trustee Act, 1850, s. 32; as, for example, where the last surviving trustee has died, after committing a breach of trust which renders it inexpedient that new trustees should be appointed by his personal representatives (see *Re Pilling's Trusts*, 27 Sol. Journ. 199); or where the nature of the trust property is such that a vesting order is necessary; as to which see note on s. 34, sub-s. (3), p. 99, *post*.

If the persons in whom a joint power to appoint is vested cannot agree, the Court will make the appointment. (*Re Tempest*, L. R. 1 Ch. 485.)

A decree for the administration of the trusts does not take away a power to appoint new trustees; but if the Court should disapprove of the selection made, it will require the appointor to make a fresh nomination. (*Re Gadd, Eastwood* v. *Clark*, 23 Ch. D. 134.)

Representatives of a deceased trustee cannot be compelled to exercise the power to appoint new trustees given by this section; nor will they incur liability to costs by reason of their refusal. (*Re Sarah Knight's Will*, 26 Ch. D. 82.)

Where a power contained in a settlement, which is exercisable only with consent of a beneficiary, has ceased to be exercisable, the fact that such power was subject to such consent is not the expression of a "contrary intention" within the meaning of sub-s. (7), so as to prevent the statutory power from being exerciseable without such consent. (*Cecil* v. *Langdon*, 28 Ch. D. 1.)

The power conferred by this section may be exercised, although the settlement was made before the Act, and the occasion of appointing the new trustee is for the first time provided for by the Act. (*Re Walker and Hughes' Contract*, 24 Ch. D. 698.)

As to the appointment of separate sets of trustees for separate shares of the trust property, see the Conv. Act, 1882, s. 5, and note thereon, p. 170, *post*.

The S. L. Act, 1882, sects. 38—44, *post*, makes special provision as to trustees with reference to the purposes of that Act.

In the schedule to the Stamp Act, 1870, the words, "appoint-

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ment of a new trustee," are not confined to appointments by deed; and it therefore seems that any appointment under this section will require a ten shilling stamp.

Sect. 32. Retirement of trustee.

32.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this Act.

Sect. 31, sub-s. (3), p. 92, *ante*, enables the number of trustees to be reduced to not less than two, but the only case to which that provision applies is that of a new appointment. The present section sanctions such reduction when no new appointment is made, but the retiring trustee must declare by deed his desire to be discharged.

This provision will often be found useful. It enables trustees to effect without the aid of the Court what the Court has, until recently, often done under proper circumstances. In *Re Stokes' Trusts*, L. R. 13 Eq. 333, Lord Romilly appointed two continuing trustees to be sole trustees. This was followed by Jessel, M. R., in *Re Harford's Trusts*, 13 Ch. D. 135, and *Re Watson*, 19 Ch. D. 384; and by V.-C. Malins in *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Gibbin's Trusts*, W. N. 1880, p. 99; and *Re Northrop*, W. N. 1880, p. 184; 29 W. R. 134. But in *Re Colyer*, W. N. 1880, p. 131; 50 L. J. Ch. 79, Cotton, L. J., following his previous decision in *Re Nash*, 16 Ch. D. 503, refused to follow these cases. The anticipation expressed in the first edition, that in future the analogy furnished by this section would encourage the judges to take the more liberal view of their authority, has not been verified; but Jessel, M. R., in *Re Aston*, 23 Ch. D. 217, expressly stated that he adhered to his former opinion, though

he intended to follow *Re Colyer*, in order to avoid a difference in the practice of the judges of the Court. If the fund is immediately divisible, a lunatic, &c., trustee may be removed, without appointing a new trustee in his place. (*Re Martyn*, 26 Ch. D. 745.) In *Re Lamb's Trusts*, 28 Ch. D. 77, Pearson, J., assumed that the rule in *Re Colyer*, *supra*, is now the rule of the Court. (See also *Re Ray*, 47 L. T. 500; *Re Mace's Trusts*, W. N. 1887, pp. 232, 238.) C. A. 1881, Sect. 32.

As to vesting the trust property in the continuing trustees, see s. 34, p. 98, *post*.

In framing wills and settlements comprising considerable property, the operation of this section will probably be excluded or modified.

It is conceived that the words, "shall by the deed be discharged," do not make it necessary to include the whole transaction in a single deed. (See *Warburton* v. *Sandys*, 14 Sim. 622, at p. 631.) The repetition of the words "by deed" before the word "consent" seems to show that the declaration and the consent may be contained in separate deeds, which would be read as one. But the more convenient method will be to include the whole in one deed.

33.—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. Sect. 33. Powers of new trustee appointed by Court.

(2.) This section applies to appointments made either before or after the commencement of this Act.

This is a re-enactment of the concluding part of s. 27 of Lord Cranworth's Act, with the addition, that a new trustee appointed by a Court shall acquire the powers conferred by the instrument creating the trust before the property is vested in him. But though he can apparently exercise, or concur in exercising, a power of sale, it does not follow that he has any power to convey.

It is conceived that powers which are by their nature personal, unless they are expressly annexed to the office of trustee as such, are not within this section. Such are a discretion to give or withhold consent in the case of marriage, or to alter the distribution of a testator's estate. In such cases, even the expression "said trustees" in a will would probably be held to be equivalent only to a repetition of the names of the designated trustees, and would not attach the discretion to the office.

It has been suggested that this section will take effect where

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trustees are appointed in an action, and will obviate the need for a petition under the Trustee Acts. (Wolstenholme & Turner, Conv. Acts, 3rd ed. p. 84; 4th ed. p. 89.)

Sect. 34. Vesting of trust property in new or continuing trustees.

34.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

Notwithstanding the equivocal character of the words, "*by virtue of the deed* become *and are* the trustees for performing the trust," it will probably be held that such a declaration as in this sub-section mentioned suffices to vest the property in continuing as well as in new trustees. Perhaps the words, "by virtue of the deed," may be taken to qualify only the word "become." But it is the opinion of some conveyancers that the section cannot safely be relied upon in cases where the trust property comprises land, unless there are no continuing trustees.

It is conceived that this section only enables the declaration to add a new link to a title which is otherwise complete, and that it would not enable property to be vested in new trustees which had passed wholly out of the legal control of the old ones. For general remarks upon the operation of the section, see note at end.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable

in books kept by a company or other body, or in manner prescribed by or under Act of Parliament. C. A. 1881, Sect. 34.

Equitable estates in copyholds, when already subsisting, pass by assignment under the former law, and will doubtless pass by such declaration as is contemplated in this section. It may be a question whether, when no separate equitable interest is subsisting, and only legal copyholds are vested in trustees, such a declaration would pass a right similar to that which is acquired by a covenant to surrender. As against the lord, no right seems to be acquired.

Where a transfer of a trust estate, which comprises certain of these excepted particulars, cannot be obtained, the Court will by an order vest the trust estate in new trustees who have been duly appointed. (*Re Harrison's Settlement Trusts*, W. N. 1883, p. 31; *Re Keeley's Trusts*, 53 L. T. 487.)

Where a trustee becomes incapable, and there is vested in him property which, coming within this sub-section, cannot be vested in new trustees by a declaration made under the first sub-section, the proper course is not to appoint a new trustee under s. 31, *ante*, but to apply to the Court to make the appointment; because, unless the Court appoints the trustee, it has no jurisdiction, under s. 34 of the Trustee Act, 1850, to make a vesting order. (*Re Vicat*, 33 Ch. D. 103; *Re Dewhirst's Trusts*, *ibid.* 416.)

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5.) This section applies only to deeds executed after the commencement of this Act.

In cases where a trustee is discharged from the trust, and, by reason of his absence or incapacity, his concurrence in transferring the property cannot be obtained, this section conveniently enables the trust property to be transferred without his concurrence. But where such concurrence can easily be obtained, there is no apparent motive to substitute a declaration for a conveyance; and in all cases where the trust estate includes property in respect of which it is not desirable to place the trust upon the title, the old practice of conveying by a separate deed should still be adopted, and the declaration made under this section, if any, should be limited to that part of the property to which the objection does not apply. See the notes on s. 63, sub-s. (1), of the S. L. Act, 1882, with regard to the question, how far trusts which create interests by way of succession can now be kept off the title; and in particular, the remarks at end of note, p. 297, *post*.

The word "deed" is emphatic, and is contrasted with the word "writing" in s. 31, sub-s. (1), p. 91, *ante*.

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The mere appointment of new trustees does not, it is conceived, suffice to vest equitable estates in them. Equitable estates appear to need formal conveyance no less than legal estates (*Tasker* v. *Small*, 3 My. & Cr. 63, at p. 70); and such conveyances need formal limitation of the estates conveyed (1 Prest. Abstr. 146), though the interests of the parties themselves may be sufficiently bound by any contract (*Tasker* v. *Small, supra*); but even a purchaser cannot, before conveyance, enforce his rights against a stranger. (*De Hoghton* v. *Money*, L. R. 2 Ch. 164.)

In *Dodson* v. *Powell*, 18 L. J. Ch. 237, it was decided, not that equitable interests passed without conveyance to the new trustees upon their appointment, but that, there being nothing vested in the old trustees which they could convey, they could not be compelled to execute any conveyance.

Since the declaration mentioned in this section deals only with trustees, and operates to vest the trust property in them as joint tenants, a doubt might be raised whether the section will take effect where only a single trustee is appointed in the place of a last retiring or single trustee. Such appointments are not favoured; but if the appointment is valid, it would appear to be the better opinion that the property could be vested in the new trustee under this section. Public policy would not be served by a contrary ruling; for the property could, in the case supposed, be vested in the sole trustee by ordinary conveyance. By Lord Brougham's Act (13 & 14 Vict. c. 21) the plural includes the singular, and, if this interpretation be adopted, the words "as joint tenants" would be treated as inoperative in the case supposed.

The declaration implies no covenant against incumbrances by the retiring trustee, and, where such a covenant is appropriate, it should still be inserted.

By s. 50, p. 126, *post*, a person may now assign a *chose in action* to himself and another.

Since the declaration is in effect a statutory conveyance, the usual notices should still be given where the settlement includes a *chose in action*.

As to vesting trust property belonging to religious bodies, see 13 & 14 Vict. c. 28; of which s. 5 was repealed by 38 & 39 Vict. c. 66.

Searches in register counties may now in some cases be advisable in the name of the person empowered to appoint trustees, as well as of the trustees.

The appointment of new trustees, and the vesting of property in them, are distinct matters within the Stamp Act, 1870; and it seems that a separate stamp is required in respect of each, notwithstanding the provision in s. 78 of that Act, that a conveyance made "for effectuating" the appointment of a new trustee is not to be charged with a higher duty than ten shillings. (See *Hadgett* v. *Commissioners of Inland Revenue*, 3 Ex. D. 46.) The same principle seems to be applicable to cases where a trustee retires and no successor is appointed.

Sect. 35. Power for trustees for

35.—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell

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sale to sell by auction, &c.

or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

This section was supplementary to Part I. of Lord Cranworth's Act. The whole of Lord Cranworth's Act has now been repealed, as from the 31st December, 1882, by the S. L. Act, 1882 (see the Schedule to that Act, p. 301, *post*); but by virtue of this section, the words "upon trust for sale," or "with power to sell," will imply the forms commonly in use.

Trustees having a power of sale might formerly have concurred with other vendors, though not expressly authorized so to do, if the trust property would thereby fetch a better price. See *Cooper to Harlech*, 4 Ch. D. 802, at p. 819, a case which in some measure weakens, or explains away, *Rede* v. *Oakes*, 4 De G. J. & S. 505. But the onus of showing that such method of sale was beneficial rested with the trustees. Trustees cannot concur with other lessors in making a single lease of adjoining properties. (*Tolson* v. *Sheard*, 5 Ch. D. 19; and see note on the S. L. Act, 1882, s. 19, p. 217, *post*.)

Ordinarily a trustee may concur with the owners of other interests in the same property, in making a sale of the whole. As to the apportionment of the purchase-money, see *Morris* v. *Debenham*, 2 Ch. D. 540.

As to the distinction between a trust for sale and a power of sale vested in trustees, see Lewin on Trusts, ch. 18, s. 2; Jarman on Wills, ch. 19.

As to the circumstances which will determine such a trust or power, see *Lantsbery* v. *Collier*, 2 K. & J. 709; *Peters* v. *Lewes and East Grinstead Railway*, 18 Ch. D. 429; *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624; *Biggs* v. *Peacock*, 22 Ch. D. 284.

Sect. 36. Trustees' receipts.

36.—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other

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personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this Act.

This is an extension of the corresponding provision in Lord Cranworth's Act, s. 29, which only referred to "money."

All trustees who have not effectually disclaimed or retired ought to join in the receipt, even if they have already conveyed the estate to the co-trustees. (See *Crewe* v. *Dicken*, 4 Ves. 97.) But it has been held in *Nicloson* v. *Wordsworth*, 2 Swanst. 365, that a conveyance may operate as a disclaimer. A purchaser, having paid his money to a third person by direction of the trustees, who, nevertheless, signed the receipt, was protected (*Hope* v. *Liddell*, 21 Beav. 183; and see *Locke* v. *Lomas*, 5 De G. & Sm. 326; *Ferrier* v. *Ferrier*, 11 L. R. Ir. 56); but in ordinary cases such a mode of payment is objectionable.

As to trustees' receipts generally, see Lewin on Trusts, ch. 18, sect. 2; and Dart's V. & P. ch. 13, sect. 3; and see note on the next following section.

Money paid into Court under the Lands Clauses Act, 1845, can be paid out to trustees entitled, without notice to the *cestuis que trustent*. (*Re Thomas' Settlement*, W. N. 1882, p. 7; 45 L. T. 746.)

Sect. 37. Power for executors and trustees to compound, &c.

37.—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or

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arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.

This section takes the place of s. 30 of Lord Cranworth's Act. For an example of a compromise held to be good under that section, see *West of England, &c. Bank* v. *Murch*, 23 Ch. D. 138. In *Re Warren, Weadon* v. *Reading*, W. N. 1884, p. 181; 53 L. J. Ch. 1016, the power of compounding conferred by the corresponding section of Lord Cranworth's Act, was held to extend to the claims of persons claiming a share as residuary legatees.

It seems that the only question to be considered since the Act, with reference to the conduct of an executor (or trustee) will be, whether he has acted in good faith or not: per Jessel, M. R., in *Jones* v. *Owens*, 47 L. T. 61, at p. 64.

An executor cannot, though trustees may, be deprived of the powers given by this section. The enactment refers to trustees constituted by will as well as by deed. With regard to the use of the word "authorized," the question will arise, whether an express authority is needed, or whether the common form, "or the survivors *or survivor* of them, &c., or other the trustees *or trustee* for the time being of these presents," will suffice to give a "sole" (which seems here to mean a *single*) trustee the powers conferred by this section. Where the above-cited form is used, and it is not desired that a single trustee should have the powers, an express declaration should be inserted to that effect.

Since executors are considered at law as one person, the act of one is the act of all, and a release by one binds the rest; and it has been held that if one executor settles an account, such settlement (if *bonâ fide*) will be good against the other executors, even if they dissent. (*Smith* v. *Everett*, 27 Beav. 446; Williams on Executors, pt. iii. bk. i. ch. 2.) But the rule, as regards co-trustees, is different, and a receipt by one of two trustees, even though he was also an executor, has been held not to be a sufficient discharge. (*Lee* v. *Sankey*, L. R. 15 Eq. 204.) On the same principle it would appear that the powers given to trustees by this section must be exercised by all of them, the words "two or more trustees acting together" being equivalent to "trustees not being fewer than two." In the case of a private trust, a majority of the trustees cannot bind the minority or the trust estate. (*Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121.) In the case of charitable trusts, a majority of the trustees may act in the

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ordinary administration of the charity; and by 32 & 33 Vict. c. 110, s. 12, a majority may exercise a power of sale; but the concurrence of all is required for the exercise of other special powers. The Court has no jurisdiction to control a dissentient trustee in the exercise of a pure discretion, not coupled with a duty. (*Tempest* v. *Lord Camoys*, 21 Ch. D. 571.)

It is doubtful whether this section would authorize the release of a right of entry accruing for the breach of a condition. Its language contains nothing which is *ejusdem generis* therewith, all its terms having reference to *disputed money claims*. With respect to such rights, executors and trustees seem to remain subject to the former rule, independently of Lord Cranworth's Act, respecting compromises entered into by them; namely, that they might in such matters exercise their discretion, subject to having their action reviewed, and confirmed or disallowed, as the case might require, by the Court, according as it should appear to have been for the benefit or otherwise of the estate. (*Blue* v. *Marshall*, 3 P. Wms. 381.) It is doubtful whether this rule authorizes executors or trustees to enter into a compromise with one of themselves, even though the same should be beneficial to the estate. (See *De Cordova* v. *De Cordova*, 4 App. Cas. 692.)

This section does not apply to administrators.

It was somewhat superfluously decided in *Abdallah* v. *Rickards*, 4 Times Reports, 622, that this section does not empower executors to compromise questions relating to the validity of the will under which they claim, or the testamentary capacity of the testator.

Sect. 38. Powers to two or more executors or trustees.

38.—(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act.

It is presumed that this section is designed to formulate the existing law, and to remove certain doubts that have been entertained. In *Warburton* v. *Sandys*, 14 Sim. 622, it was held that surviving trustees could sell, even where there was an express direction in the will by which the trust was created, that vacancies should be supplied within a specified time, which had expired.

As to sales by surviving trustees generally, see Dart's V. & P. ch. 13, sect. 3.

The old rule, that a bare power given to two or more persons by name, and annexed neither to an estate nor to an office, does not survive, is not altered by this section, which only extends to powers vested in executors and trustees; for it is conceived that

C. A. 1881, Sect. 38.

a power or trust, in order to come within this section, must be vested in the executors or trustees, as such, so as to annex it to the office, and not to the individual; since something more than the possession of a bare power is needed to constitute a person a trustee.

The old rules as to the survivorship of powers are conveniently stated in Farwell's Treatise on Powers, pp. 370 *et seq.*

As to the survivorship of the powers of guardians, see *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 103; 2 Wh. & Tu. L. C. 5th ed. p. 633, 6th ed. p. 693.

By the Conv. Act, 1882, s. 6, the rule that powers survive on the death of a donee is extended to the case of a disclaimer by a donee. Whether the last-mentioned section, intentionally or otherwise, allows powers, annexed neither to an estate nor to an office, to survive upon a disclaimer, will require consideration. (See note thereon, p. 172, *post.*)

VIII.—Married Women.

Sect. 39. Power for Court to bind interest of married woman.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this Act.

Applications under this section must be made by summons at chambers (s. 69, sub-s. 3, p. 151, *post*), and not on petition. (*Re Lillwall's Settlement Trusts*, W. N. 1882, p. 6.)

An order may be made under the powers given by this section, upon a petition intituled in the Settled Estates Act, 1877, without the petition being also intituled under the present Act. (*Landfield* v. *Landfield*, 30 W. R. 377.)

It seems that this section was primarily intended to alter the law declared in *Robinson* v. *Wheelright*, 6 De G. M. & G. 535, where it was held that the Court could not permit a married woman to alienate her restrained property, even to the manifest advantage of her estate.

In *Hodges* v. *Hodges*, 20 Ch. D. 749, Fry, J., made an order under this section permitting alienation; but he described the proceeding, not as *binding* the married woman's interest, but as *removing the restraint:* a strange synonym. The decision in *Re Wright's Trusts*, 15 L. R. Ir. 331, referred to below, also points to an odd interpretation of the word "bind."

In *Tamplin* v. *Miller*, W. N. 1882, p. 44, Hall, V.-C., permitted a married woman to compromise her claim upon a trust fund, as to her interest in which she was restrained from anticipation. In *Musgrave* v. *Sandeman*, 48 L. T. 215, effect was given to a compromise of an action, in virtue of which a married woman restrained from anticipation agreed to accept a lump sum in lieu of an annuity.

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The Court has no power under this section to remove the restraint simply, but only to bind the interest of the married woman for the purpose of permitting a disposition to be made which is for her benefit. (*Re Warren's Settlement*, W. N. 1883, p. 125; 52 L. J. Ch. 928.)

The power will not in ordinary cases be exercised if it appears that the real object is to pay the husband's debts with the wife's money. It must be clearly proved to the Court that it will be for the married woman's personal benefit to accede to the application. Even the desire to pay her own debts will not of necessity suffice as a compliance with this condition. The Court of Appeal expressed the opinion *obiter*, in the case of *Re Wood, Wood* v. *Kimber*, The Times, 13th January, 1885, 29 Sol. Journ. 183, that, on a liberal interpretation of the Act, the power given by this section might be exercised not merely to promote the pecuniary benefit of the wife, and that a benefit to the husband and family might be also such a benefit to the wife as is contemplated by this section, but they refused to apply this doctrine in the case before them; and it is difficult to imagine in what way a more favourable case for applying it could arise.

The Court will not use its discretion under this section so as to enable a married woman, by releasing a power of appointment among children vested in her, to give an immediate interest in the fund. (*Re Harrison, Harrison* v. *Harrison*, W. N. 1889, p. 7; aff. *ibid.* p. 22.)

In *Hodges* v. *Hodges* (*supra*) the married woman was the wife of a domiciled Frenchman, and her French creditors, being unfamiliar with restraint on anticipation, "harassed" her. The circumstances were considered exceptional, and assistance was given. (See also *Re C.'s Settlement*, 56 L. J. Ch. 556.)

In a case where a husband had expended considerable sums in improving houses which were the separate property of his wife for her life, who was restrained from anticipation, and he had in consequence become much embarrassed in his circumstances, the Court of Appeal permitted a loan to be raised by mortgage of the wife's life interest, for the purpose of paying the husband's debts, upon condition that he was made primarily liable, and that the wife's life estate should be only a collateral security. (*Re A Marriage Settlement*, 30 Sol. Journ. 702.) In a case where a married woman had joined with her husband in raising money by promissory notes, she was allowed to make her life interest liable to pay the interest on a loan contracted by him, and to pay the premiums on a policy on his life designed to recoup the trust funds. (*Re Waring and Colley's Settlement*, 82 L. T. Newsp. 300.) In a proper case, a married woman may be permitted to mortgage her reversionary interest, as to which she is restrained from anticipation, to purchase a professional practice for her husband. (*Re Torrance's Settlement*, 80 L. T. Newsp. 244; 81 *Ibid.* 118.)

A married woman, having a life interest with restraint on anticipation, being plaintiff in an action for the rectification of deeds on the ground of mistake, consented to pay the costs of all parties; and the Court, on the application of the defendant, with her consent, made an order binding her life interest for that purpose. (*Sedgwick* v. *Thomas*, 48 L. T. 100.)

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A mortgage debt was settled on a married woman for life without power of anticipation. She desired to provide funds for the purpose of emigration, and an order was made authorizing the sale of her life estate. (*Re Flood's Trusts*, 11 L. R. Ir. 355.) The report contains the order *verbatim*. This seems to be an extreme case.

It is proper to accompany the application with at least the outline of a scheme, if it is sought to raise money; and the Court will probably not consider it beneficial if the proposed rate of interest is excessive, or the terms onerous in other respects; *e. g.*, a stipulation to mortgage a property and to insure a life by way of collateral security, would generally be deemed excessive.

It seems that the Court, by order made after the commencement of the Act, might, with the married woman's consent, validate a deed executed before the commencement of the Act purporting to bind her interest.

It has been held by Fry, J., that the married woman need not be separately examined as to her consent. (*Hodges* v. *Hodges*, *supra*.) *Sed quære;* and, also, whether, if separate examination should hereafter be held to be necessary, the want of it would come within any of the cases provided for by s. 70, p. 152, *post*. In the later case of *Musgrave* v. *Sandeman*, *supra*, Pollock, B., directed the married woman to be separately examined. In *Harris* v. *Harford*, W. N. 1888, p. 190, North, J., declined to lay down any fixed rule.

In *Shipway* v. *Ball*, 16 Ch. D. 376, Malins, V.-C., held that a married woman, being a minor, could not consent to waive her equity to a settlement. The same principle seems to apply to consents under this section.

In *Re Little's Will*, 36 Ch. D. 701, an order was made under this section without serving the trustees, the transaction being a small one.

In *Re Jordan, Kino* v. *Picard*, W. N. 1886, p. 6; 34 W. R. 270, the order was refused, it being doubtful whether a forfeiture of the married woman's interest might not be incurred.

In the following cases, also, the restraint has been removed on the ground that the proposed transaction was for the benefit of the married woman:—Where money was required to be raised for the purpose of carrying on a business for the benefit of a married woman living apart from her husband: *Ex parte Thompson*, W. N. 1884, p. 28; where, owing to the restraint, a married woman was unable to sell property to which she was otherwise absolutely entitled: *Re Tippett's and Newbould's Contract*, 37 Ch. D. 444; where a married woman, otherwise absolutely entitled, desired to consent to an advantageous investment, which was not within the terms of the trust: *Re Wright's Trusts*, 15 L. R. Ir. 331; where a married woman had mortgaged her interest in land, and there was danger of eviction for non-payment of head-rent, the restraint was removed for the purpose of enabling the mortgagees to sell under their power of sale, the sale being made at a full value: *Re Segrave's Trust*, 17 L. R. Ir. 373; where two married women were tenants in common, and their powers of dealing advantageously were impeded, the

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Court permitted a partition and re-settlement: *Re Currey, Gibson* v. *Way*, W. N. 1887, p. 28; 35 W. R. 326.

The powers conferred by the S. L. Act, 1882, can be exercised by a married woman without application to the Court, notwithstanding that she is restrained from anticipation. (See s. 61, sub-s. 6, of that Act, p. 293, *post*.)

Sect. 40. Power of attorney of married woman.

40.—(1.) A married woman, whether an infant or not, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this Act.

A deed executed by an attorney appointed by virtue of this section, will of course require to be separately acknowledged in all cases in which separate acknowledgment would be required if the deed were executed by the married woman.

As to acknowledgments by married women, see now the Conv. Act, 1882, s. 7, p. 173, *post*.

There seems to be nothing to prevent a married woman from irrevocably appointing an attorney, under s. 8 or s. 9 of the Conv. Act, 1882. It therefore seems that, notwithstanding this section, income, as to which she is restrained from anticipation, ought not in general to be paid to an attorney. (*Kenrick* v. *Wood*, L. R. 9 Eq. 333.) Otherwise she might be able to evade the restraint; and it seems to be well established, that the restraint cannot be released or evaded, even for the purpose of recouping loss occasioned by deliberate fraud to which the married woman was herself a party. (See *Clive* v. *Carew*, 1 J. & H. 199; *Stanley* v. *Stanley*, 7 Ch. D. 589.) Upon the same principle, election could not be enforced against a married woman, restrained from anticipation. (*Re Vardon's Trusts*, 31 Ch. D. 275, and cases there referred to.) In *Stewart* v. *Fletcher*, 38 Ch. D. 627, an order was made for payment of the income of a fund in Court to an attorney, but only on an affidavit or statutory declaration that he received it on behalf of the married woman, and not of any other person to whom she had purported to assign it. This order was made upon the ground that the married woman was about to go to India, and that the expense of executing a fresh power of attorney after the accrual of each dividend would have been unreasonably large. In such a case the fact of the restraint ought to appear on the face of the order. (*Ibid.*)

As to powers of attorney, see sects. 46—48, pp. 121—126, *post;* and as to irrevocable powers, see the Conv. Act, 1882, sects. 8 and 9, p. 176, *post*.

IX.—Infants.

C. A. 1881, Sect. 41.

Sales and leases on behalf of infant owner.

40 & 41 Vict. c. 18.

41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

The operation of this section will probably be to a great extent superseded by sects. 59 and 60 of the S. L. Act, 1882, pp. 290, 291, *post*.

Previously to this enactment the Courts had no power to sell an infant's lands, except under special statutes, such as the Partition Act. (See *Calvert* v. *Godfrey*, 6 Beav. 97; *Blacklow* v. *Laws*, 2 Ha. 40; Dart, V. & P. 5th ed. c. 21, s. 5; 6th ed. c. 20, s. 5, p. 1350.)

By s. 4 of the Settled Estates Act, 1877 (which re-enacted sects. 2 and 4 of the Act of 1856), the Court can authorize leases of settled estates. The interpretation clause includes among settled estates, "all hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement."

By s. 16 of the same Act (which re-enacted s. 11 of the Act of 1856) the Court has power to authorize a sale of a settled estate, or of timber, not being ornamental timber.

By sects. 46 and 49 of the same Act (which re-enacted and extended sects. 32 and 36 of the Act of 1856) tenants for life, or the guardians of infant tenants for life, are empowered to grant leases; and though the fact of making an infant's estate a "settled estate" does not necessarily make an infant owner in fee a "tenant for life," it has been thought that the power given to the guardians of infant tenants for life will be extended to the guardians of infant owners in fee. This difficulty, however, is laid at rest by sects. 6, 59 and 60 of the S. L. Act, 1882, *post*, which give to a tenant for life power to grant leases, and give to some person to be appointed by the Court, on the application of the guardian or next friend of an infant owner, the powers that may be exercised by a tenant for life.

Sect. 46 of the Settled Estates Act, 1877, excepts the principal mansion house from the power of leasing; but this restriction is removed by s. 6 of the S. L. Act, 1882, *post*, subject to the conditions imposed by s. 15 of the same Act.

So far as regards a leasehold interest to which an infant is entitled, the Settled Estates Act, 1877, is applicable (see s. 2 of that Act); but it is not clear that s. 59 of the S. L. Act, 1882, includes such interests. See note thereon, at p. 291, *post*.

The case of an infant who is entitled subject to a gift over on his death under age is within this section. (*Re Liddell*, W. N. 1882, p. 183; 31 W. R. 238.)

Since the operation of the Settled Estates Act can be excluded by express declaration (see s. 38 thereof), the question may arise whether the operation of this section might not be excluded by an express proviso annexed to a devise in fee simple to an infant.

C. A. 1881, Sect. 42.

Management of land and receipt and application of income during minority.

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

This section does not apply to the case of infants who are contingently entitled to possession. As to the case of female infants, see note, p. 113, *infra*.

The language of this section points only to the case of infants taking under a settlement, that is, a disposition which creates successive interests. It cannot be assumed that this language will be extended to include infants taking by descent, or otherwise entitled in fee simple. Sect. 41, *ante*, contains nothing to assist this extension.

If land is given on trust for sale, with a trust of the rents and profits until sale in favour of a specified person, such person, until the land is sold, is "beneficially entitled to the possession of" the land, within the meaning of this Act. See s. 2, sub-s. (iii.), *ante*. In other cases of land given in trust for sale, s. 43 applies, and express powers of management ought to be inserted.

Trustees appointed by the Court for the purposes of this section do not appear to have any power to appoint new trustees, either by virtue of s. 31, p. 91, *ante*, or otherwise. Compare the analogous case of trustees for the purposes of the S. L. Act, 1882; and see note on s. 38 of that Act, p. 259, *post*.

Trustees for the purposes of this section may be appointed on summons. (*Re Clay, Clay* v. *Clay*, 30 Sol. Journ. 619.) See, also, s. 69, sub-s. (3), p. 151, *post*.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which

have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same. C. A. 1881, Sect. 42.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

This section does not authorize the trustees to expend corpus in expenses of management. If the income should be insufficient, recourse may be had to the Court, which has jurisdiction to direct money for repairs to be raised by mortgage or otherwise. (*Re Jackson, Jackson* v. *Talbot,* 21 Ch. D. 786.)

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and

C. A. 1881, Sect. 42.

from investments of income on the trusts following (namely):

(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

This applies even if the infant has only a life interest. But see remarks on the corresponding provision in s. 43, note on sub-s. (2) thereof, p. 115, *post*.

(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii.) If the infant dies while an infant, and, being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act. C. A. 1881, Sect. 42.

The case of a married woman, being an infant, is not within this section. Sub-s. (5) (ii.), *supra*, deals only with the application of past accumulations at the time of the female infant's marriage, upon which event they become payable, and the powers of the trustees cease. After marriage, the case is provided for by the S. L. Act, 1882; see s. 61 of that Act, and note thereon, p. 292, *post*.

It is presumed that the provisions relating to the accumulations of a female infant's income, contained in sub-s. (5) (ii.), will not interfere with the operation of the Infants' Settlements Act, 18 & 19 Vict. c. 43, under which the trustees would take the accumulated fund. In such a case it might be prudent on paying the accumulations to take a receipt both from the married infant (see sub-s. (5) (ii.), *supra*), and from the trustees of her settlement.

Though sub-sects. (7) and (8) seem to contemplate only cases in which the interest of the infant arises under an instrument, the section will probably be held to apply to cases where he takes by descent.

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not. Sect. 43. Application by trustees of income of property of infant for maintenance, &c.

This section replaces s. 26 of Lord Cranworth's Act. It was decided in *Re Cotton*, 1 Ch. D. 232, that income to which the infant was only entitled contingently might be applied for maintenance; and in *Re George*, 5 Ch. D. 837, that income to which the infant was not entitled at all, though he was entitled to the corpus from which it arose, might not be so applied. In the present sub-section, the words, "the income *of that property*, or any part thereof," have been substituted for the words occurring in the corresponding section of Lord Cranworth's Act, "the whole or any part of the income *to which such infant may be entitled* in respect of such property;" which change would seem, from its nature, to have been especially adapted to meet the decision in *Re George*, and suggests that it was the intention of

C. A. 1881, Sect. 43.

the present section that the income should be applicable for maintenance, whether the infant is or is not entitled thereto. This opinion was expressed *obiter* by Kay, J., in *Re Judkin's Trusts*, 25 Ch. D. 743, at p. 748. That case, however, was not a decision upon the present section; for the question of maintenance does not appear to have been raised. In a later case, *Re Dickson, Hill* v. *Grant*, 28 Ch. D. 291, the same judge came to the opposite conclusion, and decided that the law remains in the same state as when *Re George* was decided, and that income cannot under the present section be applied for maintenance, unless the infant is at least contingently entitled thereto. This case was affirmed on appeal, 29 Ch. D. 331; and it seems to be equivalent to a decision that the above-mentioned alteration in the Act's language has no practical operation. Notwithstanding this decision, it may be desirable in wills which contain gifts of the nature above indicated, to make express provision for the disposition of the intermediate income.

In *Re Judkin's Trusts*, the judge pointed out that the present section applies only in cases where the infant is entitled to the corpus *on or before* attaining the age of twenty-one years. In that case, the infants did not become entitled until the happening of an event which would not necessarily occur at or before that time; and it was held that this would have sufficed to prevent the income from being applicable for maintenance under the present section.

Since in cases where the gift is by a parent or person standing *in loco parentis*, who has not otherwise provided for maintenance, the infant is entitled to the intermediate income, the principle of *Re Dickson, Hill* v. *Grant*, *supra*, is not applicable.

If the gift is contingent, but in the event of the happening of the contingency the accumulations of the intermediate income will, in consequence of the testator having directed a fund to be set apart to provide for the gift, belong to the legatee, maintenance can be given out of the income (*Re Medlock's Trusts*, *Ruffle* v. *Medlock*, W. N. 1886, p. 111; 55 L. J. Ch. 738): otherwise the intermediate income does not belong to the legatee, and cannot, unless the gift is by a person *in loco parentis*, who has not otherwise provided for maintenance, be applied for his maintenance under this sub-section. If the gift is absolute, but liable to be defeated, the intermediate income cannot, under this sub-section, be applied in maintenance, because it gives maintenance only in cases where, under the next following sub-section, the residue of the income is to be accumulated "for the benefit of the person who *ultimately* becomes entitled to the property" from which it arises; but, in the case supposed, the infant, though entitled only defeasibly to the corpus, is indefeasibly entitled to the income; so that, under the present sub-section, the income cannot be applied in maintenance, because otherwise, under the next sub-section, the infant's estate would be deprived of the accumulations to which he is indefeasibly entitled. (See *Re Buckley's Trusts*, 22 Ch. D. 583.) Wills and settlements containing gifts in this form should therefore contain also an express power of maintenance.

In *Re Breed's Will*, 1 Ch. D. 226, an unsuccessful attempt was

made to apply the provisions of Lord Cranworth's Act in respect of maintenance after an infant had attained majority, the fund not being payable until the attainment of the age of twenty-five. C. A. 1881, Sect. 43.

In *Re Cotton*, 1 Ch. D. 232, Jessel, M. R., expressed an opinion that the word "guardian" in Lord Cranworth's Act included the father, as guardian by nature.

When the case of *Re George* came before the Court on a previous occasion (W. N. 1876, p. 298; 25 W. R. 182) it was held that the rule, that income of a fund given by a parent or a person *in loco parentis* payable at a future time is applicable for maintenance, as to which see *Heath* v. *Perry*, 3 Atk. 101, does not apply to cases in which the donor has otherwise provided for maintenance.

As to the cases in which a deferred gift does or does not carry intermediate interest, see 2 Wh. & Tu. 5th ed. p. 293; 6th ed. p. 312.

As to the evidence of proper application of maintenance money, see *Re Evans, Welch* v. *Channell*, 26 Ch. D. 58.

The trustees must exercise the discretion given to them as to granting maintenance, and must not blindly pay over income to a guardian as such. See *Wilson* v. *Turner*, 22 Ch. D. 521. It would be proper that trustees should require from the guardian at least the outline of a scheme for maintenance and education. *A fortiori*, where trustees are empowered to pay the whole or any part of the capital to a parent or guardian, they must not hand over any capital without a proper exercise of their discretion. (*Dunning* v. *Earl of Gainsborough*, W. N. 1885, p. 110; 54 L. J. Ch. 991.)

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

In *Re Buckley's Trusts*, 22 Ch. D. 583, which was decided under the corresponding section of Lord Cranworth's Act, it was held that the direction to accumulate the residue of the income for the benefit of the person who *ultimately becomes entitled to* the property, does not apply to accumulations of income arising under an absolute gift liable to be defeated by death under twenty-one years.

The words in sub-s. (1), "either for life, or for any greater interest," are newly added in this Act. A corresponding addi-

C. A. 1881, Sect. 43.

tion was required in the present sub-section, which has not been made; with the result that, when this section is relied upon in the case of an infant tenant for life, the accumulations will go, not to the infant himself, but to the "person who *ultimately becomes entitled to the property*" from which they arise. If such person cannot be ascertained until the death of the tenant for life, the accumulation must apparently be continued during the whole of the life estate. Wills and settlements creating such life interests should, as formerly, contain a proper direction as to the destination of the accumulations.

It appears that the accumulations are not to be added to the corpus, so that no person will be entitled to the income of them, after the attainment of majority by the infant, until some person has "ultimately become entitled to the property." This seems to suggest a means of evading the provisions of Thellusson's Act; unless it should be held that the intermediate income is undisposed of.

The corresponding provisions of s. 42, *ante*, are more reasonable. See note on sub-s. (5) (i), thereof.

Accumulations of income may under this section be applied for past maintenance. (Per Chitty, J., *Re Pitts' Settlement, Collins* v. *Pitts*, W. N. 1884, pp. 225, 242.)

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

A direction that the intermediate income shall be accumulated is not such an expression of a "contrary intention" as to prevent the trustees from applying it for maintenance under this section. (*Re Thatcher's Trusts*, 26 Ch. D. 426.)

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

X.—Rentcharges and other Annual Sums.

Sect. 44. Remedies for recovery of annual sums charged on land.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling

payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

C. A. 1881, Sect. 44.

By 18 & 19 Vict. c. 15, s. 12, all life annuities or rentcharges granted otherwise than by marriage settlement (or by will, see s. 14), are void as against purchasers, &c. unless registered.

The words of the present sub-section, "or out of the income of any land," seem to include the case of an annuity secured upon a rent incident to a reversion; for such annuity is not incident to a reversion.

It sometimes, though not often, happens that a legal rentcharge is vested in an infant by a settlement. In such cases the rentcharge should be declared to be payable to the trustees during the infancy, and they will then be able to exercise the statutory powers conferred by this section.

Rent is divided by Littleton (s. 213) into *rent service*, *rent charge*, and *rent seck*.

Rent service includes rent incident to tenure, commonly called chief rent or quit rent, and rent incident to a reversion; and it may be distrained for by the common law. Rent granted in consideration of the enfranchisement of copyholds, by virtue of 6 & 7 Vict. c. 23, s. 2, is thereby expressly declared to be rent service, and to be parcel of and appendant and appurtenant to the manor of which the enfranchised copyholds were parcel. Rentcharge is a rent issuing out of land, which is not incident to the tenure or to the reversion upon any estate of the person liable to pay it, but is made distrainable by express contract ("by force of the writing only, and not of common right." Litt. sect. 217). Rent seck was a rent similar to the latter, but not distrainable (*ibid.*); and might arise (1) by the grant of a rentcharge unaccompanied by a power of distress; (2) by the severance of a rent service from the tenure, or the reversion, to which it was incident; or (3) by the release of a power of distress which once existed (Shep. T. 253).

A rent granted for equality of partition among coparceners is distrainable at common law without any express power of distress. (Finch, Law, p. 156.)

Rents seck were made distrainable by 4 Geo. 2, c. 28, s. 5, which is still in force.

The effect of the last-mentioned Act, and of the present section, is, that rents are now most obviously, in reference to the essential distinctions between them, divisible into—(1) chief rents; (2) rentcharges; and (3) rents incident to a reversion.

A rentcharge may be granted out of a term of years. (Co. Litt. 147 b.) It is a chattel interest. (1 Prest. Abstr. 358.)

Only the king has had power, since *Quia Emptores* (18 Edw. 1), to reserve a rent incident to tenure; *i. e.*, to tenure, as distinguished from and unaccompanied by any reversion, which is tenure in fee simple. (Fitzh. N. B. 210 C.) But the reservation of a rent upon a conveyance in fee will be construed as

C. A. 1881, Sect. 44.

creating a rent, *i. e.*, a rentcharge or rent seck. (*Per curiam*, *Newcomb* v. *Harvey*, Carth. 161, at p. 162.) As to the reservation of chief rents before the statute, see Litt. sect. 216.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

The owner of a rentcharge granted by a tenant in fee simple, free from incumbrances, has power under this sub-section to expel from actual possession a tenant for years holding under a demise subsequent to the rentcharge. This power is a remedy which "might have been conferred by the instrument under which the annual sum arises"; see sub-s. (i.), *supra*; and the fact that, by s. 2, sub-s. (iii.), *ante*, "possession includes receipt of income," does not prevent it from also including possession.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or

C. A. 1881, Sect. 44.

by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

The power to demise conferred by this sub-section is not in accordance with the usual practice, and seems to be dangerous. There is nothing to show that a term might not be created by virtue of it, capable of being enlarged into a fee simple by virtue of s. 65, p. 142, *post*. Thus the owner of the rentcharge might practically dispose of the fee simple, merely by reason that the rent, though not demanded, had become in arrear for forty days. This indirectly gives to the owner of a rentcharge in fee an everlasting power of sale, which is very much more stringent, as regards the conditions under which it is to arise, than the power of sale given to mortgagees by s. 19, p. 67, *ante*. The power will probably be excluded, by virtue of sub-s. (5), *infra*, upon creations of rentcharges after this Act.

The question may also arise, whether, since the terms to be created under this section are interests in the nature of uses to arise upon a contingency, which contingency is not such as must necessarily happen within the time limited by the rule against perpetuities, the power is not simply void; or at least, whether it could be exercised after the expiration of the time limited by the rule. By virtue of sub-s. (1), *supra*, the power will not have any greater validity than it would have had if it had been conferred by the instrument creating the rent-charge.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

It must be remembered that rentcharges created by appoint-

C. A. 1881, Sect. 44.

ment might be held to date from the creation of the power, not from its exercise. The Act cannot safely be relied upon where the instrument creating the power was executed before the commencement of the Act.

Sect. 45. Redemption of quit rents and other perpetual charges.

45.—(1.) Where there is a quit rent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

For the division of rents, see note on s. 44, sub-s. (1), *ante*.

The Copyhold Commissioners are now merged in the Land Commissioners for England, constituted by the S. L. Act, 1882. (See s. 48 of that Act, p. 272, *post*.)

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

This section seems not to apply where the person entitled is under any disability. Coverture is not for this purpose a disability, in the case of women married after the 31st December, 1882, or, so far as regards "rents" held by a subsequently accruing title, in the case of women married before that date. (See the Married Women's Property Act, 1882, sects. 2, 5, *post*.)

If a rent in fee simple should be included in a settlement, the question may arise whether the tenant for life is a person "empowered to dispose thereof absolutely" within the meaning of this sub-section. Though he has power to sell the rentcharge, he is not the person to whom a payment or tender of the purchase-money should be made. (See the S. L. Act, 1882, s. 22, p. 231, *post*.)

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land

shall be thereby absolutely freed and discharged from the rent. C. A. 1881, Sect. 45.

If, on the tender, acceptance is refused, there is nothing in the section to oblige the owner of the land, or any other person, when the rent has been redeemed, to pay the "capital value" to the person formerly entitled to the rent.

The land will, of course, be discharged only in so far as the person to whom the tender is made was entitled to dispose of the rent. It cannot be supposed that the Commissioners are to investigate and finally adjudicate upon the title.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

"Rent reserved on a sale" seems to mean a rentcharge created on occasion of a sale, in whole or part discharge of the consideration therefor; though such a creation is very improperly styled a reservation. The only rent which admits of being "reserved," is rent incident to a reversion; which can never be "perpetual," because no particular estate can be perpetual.

Rentcharges may lawfully be created upon a sale for full and *bonâ fide* valuable consideration of land to charitable uses. (See 27 & 28 Vict. c. 13, s. 4.)

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

XI.—Powers of Attorney.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. Sect. 46. Execution under power of attorney.

C. A. 1881, Sect. 46.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

Sections 8 and 9 of the Conv. Act, 1882, must be read in connection with this and the two following sections. The following is an outline of the salient points in these enactments:—

1. The present section permits execution in the name, &c. of the attorney.
2. Sect. 47, in all *bonâ fide* dealings, whether with or by attorneys, protects the person so dealing, although the power of attorney may, *without the knowledge* of such person, have been determined by the death, &c. of the principal.
3. Sect. 8 of the Conv. Act, 1882, validates *in favour of purchasers*, acts done under a power of attorney *given for valuable consideration*, and in the instrument creating it *expressed to be irrevocable*. This does not depend upon the absence of notice.
4. Sect. 9 of the same Act validates *in favour of purchasers*, acts done under any power of attorney (not necessarily given for valuable consideration) which in the instrument creating it is expressed to be irrevocable *for a fixed specified time* not exceeding one year from the date. This also does not depend upon the absence of notice.
5. Sect. 48 of the present Act permits powers of attorney to be deposited at the Central Office of the Supreme Court.

A power of attorney is, at common law, under ordinary circumstances, revocable at will, and is *ipso facto* revoked by the death of the principal. But a mere licence is not revoked by the death of the licensor. (Co. Litt. 52 b, *ad fin.*)

Bare authorities or powers cannot be delegated to an attorney, and an executor having authority to sell or lease cannot appoint an attorney for the purpose. Nor can an attorney himself act by an attorney; nor can a person enabled to do a thing only by special custom (as an infant to make a feoffment by the custom of gavelkind) do it by attorney. (See *Combe's Case*, 9 Rep. 75, at p. 76.)

An attorney may be appointed for a special purpose, such as to make or take livery of seisin (Co. Litt. 52 a); and generally a man can do by attorney what he can do in his own right. A copyholder may surrender or be admitted by attorney. A man may execute a deed by attorney, and may constitute an attorney with a general power to sell his lands and goods, or to sue *in omnibus causis motis et movendis*. (1 Salk. 96.) The same rules now extend to married women, so far as they are applicable. (See s. 40, and note thereon, p. 108, *ante*.)

Persons who for other purposes are disabled in law may commonly be attorneys for the purpose of delivering seisin on a feoffment. (Co. Litt. 52 a.)

The authority must be strictly pursued; and, therefore, one of two attorneys cannot act alone; and if one dies the power does not survive, nor can one act on the refusal of his co-attorney,

C. A. 1881, Sect. 46.

nor can an authority given to three jointly or severally be executed by two jointly. (Co. Litt. 112 b, 113 a, 181 b.)

An authority to sell as attorney, does not include authority to pledge. (*Coondoo* v. *Watson*, 9 App. Cas. 561.)

Formerly, if an attorney acted in his own name, not expressing that he was acting as attorney, the act was void; and therefore if an attorney, having authority to execute leases, purported to make a lease in his own name, it was void. (9 Rep. 76 b, 77 a.) In *Frontin* v. *Small*, 2 Lord Raym. 1418, 1 Stra. 705, it was even held that a lease executed by an attorney in her own name, though expressed to be "for and in the name of" the principal, was void, and that no action on the covenants lay against the attorney. The present section alters the law upon this point.

So long as the execution was done by the attorney substantially as the act of the principal, not as his own act, it was sufficient. In *Wilks* v. *Back*, 2 East, 142, the signature "For J. B. (*the principal*) M. W. (*the attorney*)," was held sufficient.

Before the enactment of this section a lease could be executed on behalf of a lunatic by the committee, using his own name and seal. (*Lawrie* v. *Lees*, 7 App. Cas. 19.)

A lease made by an *agent* of a lessor must be executed in the name of the lessor; otherwise the agent may be held personally liable, even though the instrument should be expressed to be made "for and on behalf of" the principal. (*Norton* v. *Herron*, 1 C. & P. 648; Ry. & M. 229; *Tanner* v. *Christian*, 4 E. & B. 591.) This seems still to be the law.

As regards copyholds, an attorney may surrender either in his own name or in the name of his principal. (Scriv. Cop. 4th ed. p. 128.)

The principal and not the attorney ought still to be named party to a deed executed under a power of attorney. And though, by virtue of the present section, the execution will be valid if the attorney should execute in his own name, this course would be inconvenient. The practice formerly in use ought to be continued.

As to the execution of deeds by attorneys on behalf of companies registered under the Companies Acts, see the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 55, and the Companies Seals Act, 1864, 27 & 28 Vict. c. 19, s. 7.

Sect. 47. Payment by [*qu.* or to] attorney under power without notice of death, &c. good.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

The odd phrase, "*shall not be liable in respect of* the payment"

C. A. 1881, Sect. 47.

seems to mean, that he shall not be liable to pay the money a second time, after having once paid it under such circumstances as, in the absence of the contingencies specified in this sub-section, would have given him a good discharge at common law.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.

The marginal note seems to be incomplete. The phrase "in pursuance of a power of attorney," which is copied with a slight variation from 22 & 23 Vict. c. 35, s. 26, would naturally apply only to acts done by the attorney, not to the acts of persons dealing with him. But attorneys often receive money, while they comparatively seldom pay it. If payments made to attorneys should be held not to come within this section, its provisions will have little practical effect. The words were probably meant to include all dealings with, or by, an attorney, in reliance upon the validity of a power. This view is strengthened by the language of sub-s. (2).

The section extends the protection given by 22 & 23 Vict. c. 35, s. 26, to trustees, executors, and administrators, acting *bonâ fide* in pursuance of a power of attorney, so as to apply generally; and it provides for lunacy, unsoundness of mind, and bankruptcy, in addition to death and revocation; and in the saving clause (sub-s. 2) it substitutes the rights of persons "interested in" for those of persons "entitled to" money paid.

By virtue of the present section, a purchaser is not now concerned, provided that there is a valid contract binding upon the vendor and his estate, before paying or parting with the final control over his purchase-money, to ascertain that the vendor survived the date of the execution of a conveyance which he has executed by attorney, unless the conveyance is intended to pass a legal estate. If the conveyance comprises only an equitable estate, or such an interest as a share of residue, a valid receipt for the purchase-money is all that is essential to the purchaser's title. But the purchaser cannot pay, if he has actual notice that the vendor did not survive. By the Conv. Act, 1882, sects. 8 and 9, p. 176, *post*, the power may, in the instrument creating it, be expressed to be irrevocable, either absolutely (if given for valuable consideration) or for a fixed time not exceeding a year (whether given for value or not); in which case a purchaser will not be prejudicially affected even by actual notice that the vendor did not so survive, or by actual notice of any other fact which would otherwise have revoked the power.

In the case of these irrevocable powers, it would seem that,

after the death of the vendor, a conveyance executed by the attorney would be valid in equity, independently of the question whether it was preceded by a valid contract binding upon the vendor and his estate; and the exceedingly strong language of s. 8, sub-sects. (i.) and (ii.), and s. 9, sub-sects. (i.) and (ii.), of the Conv. Act, 1882, suggest the conclusion, that such a conveyance would even avail to pass a legal estate. Some grave inconveniences, consequent upon this result, are referred to in the note, p. 178, *post*.

C. A. 1881, Sect. 47.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

Sect. 48. Deposit of original instruments creating powers of attorney.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

The deposit of a document purporting to be a power of attorney at the Central Office of course gives it no validity or authenticity which it would not otherwise have had; and office copies will only prove (1) the fact that a certain document was deposited; (2) the fact that it contains such and such matters.

(5.) General Rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

The practice of filing instruments under this section is becoming common.

C. A. 1881, Sect. 48. For the only rule hitherto made under this section, see p. 367, *post*.

XII.—Construction and Effect of Deeds and other Instruments.

Sect. 49. Use of word grant unnecessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this Act.

Operative words in deeds are in modern times construed liberally, so as to give effect to the intention of the parties as far as possible. "*Benigne faciendæ sunt interpretationes chartarum, propter simplicitatem laicorum, ut res magis valeat quàm pereat. Verba intentioni et non e contra debent inservire.* Deeds intended, and made, to operate one way, may operate another way if the intention of the parties cannot take place unless they operate a different way from what they were intended. Judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intention of the parties. More consideration is to be had for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it." (1 Prest. Conv. 182, citing the judgment of the Court of C. P. in *Roe* v. *Tranmarr*, Willes, 682, at p. 684.) The cases are collected in the notes to *Chester* v. *Willan*, 2 Wms. Saund. 283.

Previously to the passing of this Act the word "grant" was not necessary to pass things lying in grant (*Shove* v. *Pincke*, 5 T. R. 124, 310; *Haggerston* v. *Hanbury*, 5 B. & C. 101); and now, by the 8 & 9 Vict. c. 106, s. 2, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery. The word "grant" will still be appropriate, where it is intended to imply covenants declared by statute to be implied by its use. See the Lands Clauses Act, 1845, 8 Vict. c. 18, s. 132.

The word "grant" (*concessi*) was always one of the largest and most beneficial to the purchaser that could be used, and was suitable to every kind of assurance. (Co. Litt. 301 b.) The propriety of superseding it in practice by the ugly and vague word "convey" is very questionable.

Sect. 50. Conveyance by a person to himself, &c.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to

his wife, and by a wife to her husband, alone or jointly with another person. C. A. 1881, Sect. 50.

(2.) This section applies only to conveyances made after the commencement of this Act.

By the common law, husband and wife are regarded as only one person: and therefore no conveyance of property which admits of being, as between other people, conveyed *inter vivos*, could take effect from the husband to the wife. The wife could not convey to her husband, partly for the same reason, but also because, being under coverture, she could not convey at all. But the husband could declare a trust in his wife's favour; and therefore he could convey freeholds to her by conveyance operating under the Statute of Uses. And by the same artifice he could convey freeholds to himself jointly with any other person or persons. Also a wife could, in conjunction with her husband, be a party to an action; and therefore she could be a party to levying a fine or suffering a common recovery, where the rules as to parties were the same as in real actions. Such fine or recovery would bind the wife by estoppel; and therefore, in all cases where (as in claims to dower) an estoppel was equivalent to a conveyance, a married woman could, at common law, convey by this means. Such a fine, taking effect only by estoppel at common law, needed no assistance from the statutes of fines, and was therefore good without proclamations.

In the case of freeholds the present section obviates the necessity of conveying to a grantee to uses.

Lord St. Leonards' Act, 1859, 22 & 23 Vict. c. 35, s. 21, enables any person to assign personal property, by law assignable, including chattels real, directly to himself and another person or persons or corporation by the like means as he might assign the same to another; and the present section extends the ability to the case of *choses in action*.

But the present section does not enable a man to assign leaseholds to his wife, or a woman to assign leaseholds to her husband. The Married Women's Property Act, 1882, seems to contain nothing to enable such assignments to be made. It is conceived that, in s. 1, sub-s. (1), of that Act, p. 329, *post*, the effect of the words "in the same manner as if she were a feme sole," is to prevent the marital right from attaching to property when it has been assigned, not to validate methods of assignment which would otherwise be invalid, unless, perhaps, where the method of holding would itself at common law affect the nature of the conveyance; *e. g.*, if husband and wife hold as joint tenants, they might release *inter se*. But a doubt has been raised whether the common law doctrine of the identity of husband and wife has been superseded by that Act. See *Re March, Mander* v. *Harris*, 24 Ch. D. 222. The decision of Chitty, J., in that case was reversed on appeal, 27 Ch. D. 166; but upon grounds which leave unaffected his observations upon the effect of the M. W. P. Act in relation to the *status* of coverture. In *Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148, Kay, J., dissented from the view above stated. It is submitted that the view of Kay, J., is the

C. A. 1881, Sect. 50.

more correct, because the Act is quite silent as to status, and though the old common law doctrine of the wife's disability with regard to property is a deduction from the common law doctrine as to status, it does not follow that a removal of the disability will exercise any reflexive effect upon the status. The words of s. 1 of the M. W. P. Act, 1882, p. 329, *post*, "in accordance with the provisions of this Act," signifying in accordance with the provisions of sects. 2 and 5, seem to favour this view.

The power is not restricted to conveyances by one person. Two may convey to themselves and another.

Disentailing assurances must still be made by means of conveyances to uses.

Sect. 51. Words of limitation in fee or in tail.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

(2.) This section applies only to deeds executed after the commencement of this Act.

As to how far the word *heirs* was formerly necessary in the limitation of a fee simple, see Challis, R. P. 170. As to how far it was necessary in the limitation of a fee tail, see *ibid.* 235. The word was equally necessary in the limitation of an equitable fee. (*Meyler* v. *Meyler*, 11 L. R. Ir. 522.)

Since this section refers only to *deeds*, it does not generally apply to customary assurances of copyholds.

It is conceived that the statutory words are only applicable in substitution for the old word *heirs*, and as words of limitation; and, therefore, that they are not applicable as words of *succession* in a conveyance to a corporation sole.

It is conceived that the complete omission of all words of limitation in a deed would prevent "all the estate" of a grantor seised in fee simple, or fee tail, from passing by the conveyance under s. 63, sub-s. (1), p. 141, *post*. Otherwise this section would be purely nugatory. Moreover, s. 63 seems, like the "all the estate" clause, which it is intended to supersede, to refer not to defects in the words of limitation, but to defects in the "general words" and similar additional matter which, previously to the coming into operation of the present Act (see s. 6, *ante*) were usually appended to the parcels. It has never been contended that the "all the estate" clause would heal a defect in the words of limitation.

The words *fee simple* seem to mean here fee simple *absolute*, as in the Statute of *Quia Emptores*, 18 Edw. 1, ch. 3. It is not clear whether the section was intended to apply to the limitation

of modified fees. But fee simple "in his large sense" (Co. Litt. 19 a) includes all modified fees which are capable of subsisting at common law. The section probably applies to the limitation of a determinable fee; this being strictly in the nature of a modification superinduced upon a fee simple absolute, which might as well be superinduced upon it when limited in one way as in another. The same remark does not apply to conditional fees or to qualified fees simple. The section applies to base fees arising by express limitation.

C. A. 1881, Sect. 51.

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Sect. 52. Powers simply collateral.

The following is an outline of the provisions relating to the survivorship, disclaimer, and release of powers, contained in the present Act and the Conv. Act, 1882 :—

1. Sect. 38, p. 104, *ante*, contemplates and permits the exercise of powers by *surviving executors or trustees*.
2. Sect. 6 of the Conv. Act, 1882, p. 172, *post*, contemplates and permits the exercise of powers by the *remaining* or *continuing donees*, after disclaimer of the powers by one or more of the original donees. This section makes no express mention of executors or trustees.
3. The present section contemplates and permits the total extinction of powers.

It seems to be inherent in the notion of a *disclaimer*, that it should only be capable of being executed by a person who has never intermeddled with or purported to exercise the powers which he disclaims. This remark does not apply to a release.

It seems clear that the words "by deed" govern "or contract" as well as "release"; so that a contract not under seal is not within this section.

Since the case of *Edwards* v. *Slater*, Hardr. 410, Tudor, L. C. R. P. 3rd ed. 368, a power coupled with an interest has been commonly styled "appendant" or "in gross," according as the exercise of the power could, or could not, affect the interest with which it was coupled; and a power not coupled with any interest has been commonly styled "collateral." Before that case those terms were not used with any precision or consistency. Nothing seems to be gained by adopting them; especially as they never possessed any peculiar appropriateness to the senses in which they were used.

Before the coming into operation of the present Act, a power coupled with an interest could have been released by the donee, unless such release would be in violation of a duty to exercise the power or to keep it on foot.

A power not coupled with any interest could not be released.

A covenant not to exercise a power which the donee could release would, before the Act, have operated as a release.

C. A. 1881, Sect. 52.

There seems to be nothing in the Act to alter this last rule. It is also conceived that a "contract not to exercise" a power which could not be released but for this section, will take effect as a release.

For a singular example of the use to which this section has been put, see *Shirley* v. *Fisher*, W. N. 1882, p. 128; 47 L. T. 109.

It is conceived that, notwithstanding coverture, a married woman may now release a power not coupled with an interest; and that her separate acknowledgment of the release is unnecessary. It is conceived that in the case of a power coupled with an interest, acknowledgment will still be necessary under 3 & 4 Will. 4, c. 74, s. 77, as amended by the Conv. Act, 1882, s. 7, p. 173, *post*, subject to the operation of the M. W. P. Act, 1882.

There is, perhaps, some doubt whether this section enables the donee of a power to release it in violation of a duty to preserve it. But the better interpretation seems to be, that the section only entitles the donee to release a power not coupled with an interest, to the same extent as before the Act he might have released a power coupled with an interest. It follows that trustees cannot release, and thereby extinguish, under this section, powers which are coupled with a duty (*Weller* v. *Ker*, L. R. 1 Sc. App. 11); though, under the Conv. Act, 1882, s. 6, p. 172, *post*, they may disclaim powers, and thereby leave the exercise of the powers to the remaining or continuing trustees. Where the power is not only vested in trustees, but is of a nature to imply a personal confidence in the particular individuals, such trustees can neither release, nor disclaim, the power. (*Re Eyre*, *Eyre* v. *Eyre*, W. N. 1883, p. 153; 49 L. T. 259.)

This section does not clear up the doubt, whether a bond or covenant by the donee of a testamentary power to exercise it in a particular way, is valid; as to which, see *Palmer* v. *Locke*, 15 Ch. D. 294.

On the distinction between a power properly so called, though only a bare power, and a mere authority, as a power of attorney, see Chance on Powers, sects. 1218, 2148.

As to the disclaimer of powers, and their survivorship after disclaimer, see the Conv. Act, 1882, s. 6, p. 172, *post*.

As to the fraudulent, or corrupt, release of powers, see *Cunynghame* v. *Thurlow*, 1 Russ. & My. 436, n.; *Smith* v. *Houblon*, 26 Beav. 482. It is conceived that a corrupt release would not prevent the donee of the power from subsequently exercising it. In the above-cited cases, no such subsequent exercise had been attempted.

It is to be observed that powers conferred by the S. L. Act, 1882, are incapable of assignment or release. See s. 50 of that Act, p. 274, *post*.

Sect. 53. Construction of supplemental or annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed

C. A. 1881, Sect. 53.

were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

This section seems to make no change in the law. In some cases a deed written bookwise, and afterwards annexed to a previous deed of similar shape and fashion, affords a more convenient expedient than indorsement. The section may possibly make the practice for the future more common by causing a mistaken impression that it has become more secure.

The section mentions only *deeds*. The proposed practice might usefully be applied to partnership agreements not under seal, which are not uncommon, and often require modification, and are usually so written that indorsement is impossible. It is conceived that the practice may safely be adopted in such cases.

It is conceived that a recital implied in a supplemental deed would not be implied in a third deed expressed to be supplemental to the latter. Recitals in the principal deed become sub-recitals in the supplemental deed, and do not appear to be available as evidence under s. 3, sub-s. (3), p. 9, *ante*, or under the Vendor and Purchaser Act, 1874, s. 2. In such cases, the third deed should be expressed to be supplemental to both.

The reference to the principal deed seems to give constructive notice of all its contents. A supplemental deed is an unsatisfactory root of title; and, on an open contract, would probably not be sufficient. If such a deed is expressly made a root of title, the fact that it is a supplemental deed ought to be stated.

Sect. 54. Receipt in deed sufficient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this Act.

The receipt in the body of the deed at law operated as an absolute estoppel. (*Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704.)

In equity there was no estoppel; but the receipt was evidence of the payment until the payment was disproved, the alleged payee being at liberty to offer evidence in disproof. (*Wilson* v. *Keating*, 27 Beav. 121; and on appeal, 4 De G. & J. 588.)

The cases before *Wilson* v. *Keating* only show that the receipt might be impugned *for the purpose of letting in the vendor's lien for the unpaid purchase-money*. The judgments in *Wilson* v. *Keating* (see, in particular, Lord Romilly, M.R., 27 Beav. at p. 126), which carried the principle a good deal further, show that this case was decided under a misapprehension of the earlier

C. A. 1881, Sect. 54.

cases. But there is little doubt that the ruling of *Wilson* v. *Keating* would be followed; to which the present section does not seem to oppose any obstacle.

The meaning of this section seems to be, that a receipt in the body of the deed shall, as evidence of payment in favour of the person alleged to have paid, have as sufficient an effect as such a receipt, together with the usual indorsed receipt, would previously have had. Since a discharge to the person paying, would equally be a discharge to his representatives, whether in title or personal, these also are equally within the benefit of the evidence.

Sect. 55. Receipt in deed or indorsed, evidence for subsequent purchaser.

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

(2.) This section applies only to deeds executed after the commencement of this Act.

This always was the rule, both at law and in equity, so far as the purchaser had no notice. The receipt in the body of the deed, which was invariably present, operated as an absolute estoppel at law; and the purchaser, if he had taken for valuable consideration (see as to the meaning of "purchaser," s. 2, sub-s. viii. p. 5, *ante*) without notice, was protected in equity. But hitherto the absence of the usual indorsed receipt, or its presence in an unusual place, would, under some circumstances, have given a purchaser constructive notice of the non-payment and deprived him of his equitable defence. (See *Kennedy* v. *Green*, 3 My. & K. 699.) This will no longer be the case. It seems that "not having notice" means "not having actual notice," and that "sufficient evidence" means "conclusive evidence."

This section renders it unnecessary for the transferee of a mortgage to inquire whether the consideration money was in fact paid; but it does not relieve him from inquiring into the state of the subsequent accounts between the mortgagor and the transferor at the date of the transfer.

Parker v. *Clarke*, 30 Beav. 54, seems to be practically overruled by *Bickerton* v. *Walker*, 31 Ch. D. 151; see also *French* v. *Hope*, 56 L. J. Ch. 363.

Sect. 56. Receipt in deed or indorsed, authority for payment to solicitor.

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed

C. A. 1881, Sect. 56.

receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

"It may, I think, be considered as established that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor of the vendor to receive the purchase-money." (*Per* Lord Chelmsford, *Viney* v. *Chaplin*, 2 De G. & J. 468, at p. 477; and see *Ex parte Swinbanks*, 11 Ch. D. 525.)

This section is of great practical importance, because, on payment being made to a duly authorized agent of the vendor, the latter's claim and lien for the purchase-money is gone. The section validates the acts of a statutory agent of the vendor in this behalf, subject to certain conditions, viz.:—

(1.) The agent must be a solicitor. It is uncertain whether the want of a certificate would be a disqualification. (See *Sparling* v. *Brereton*, L. R. 2 Eq. 64.) It is still more uncertain what would be the consequence if the person making the payment had notice of the want.

(2.) He must produce a deed containing, or having indorsed on it, such receipt as in the section mentioned. The execution of the deed, and the signature of the receipt, must of course be authentic.

(3.) The section speaks only of "consideration *money* or other *consideration*," *i. e.*, the consideration, whether money or money's worth, is only authorized to be paid *in specie*. There is nothing to authorize the statutory agent to accept payment of money by cheque (as to the validity of which, see *Jones* v. *Arthur*, 8 Dowl. Pr. 442); and such payment cannot safely be accepted without express authority from the principal. Probably, if the cheque should not be honoured, the solicitor (statutory agent) accepting it without express authority would become liable to the vendor. And if the cheque should be honoured, but the proceeds not duly accounted for, (for example, if the solicitor should lose the cheque, and it should be cashed to the wrong person,) it might be contended that the purchaser, not having complied strictly with the statutory conditions, which require payment of "the same," *i. e.*, the "money," on production of the deed, would not be discharged from the vendor's claim; since, even granting the banker who cashes the cheque to be the agent of the purchaser for making the payment in *money*, the section seems to have no application to his acts, as he makes the payment upon the

C. A. 1881, Sect. 56.

authority of the cheque alone, without any reference to the deed. But at a sale by auction, the auctioneer is justified in accepting payment of the deposit by cheque. (*Farrer* v. *Lacy*, 31 Ch. D. 42.) On tender in general, see the cases cited in note (D.), Coke's Rep. ed. 1826, vol. 3, p. 234.

(4.) It has been held by North, J., in *Day* v. *Woolwich, &c. Society*, W. N. 1888, p. 223, where the solicitor was acting as solicitor for the person liable to pay, that he must also be shown to be acting as solicitor for the person entitled to receive the money; and that otherwise the person paying the money will do so at his own risk. If the decision was intended to import that the solicitor producing the deed must *in every case* be the solicitor for the person entitled to receive the money, it seems to be opposed to the policy of the section.

This section does not enable a vendor to give any greater authority to a solicitor to receive the purchase-money than he might have given without it, but only enables such authority to be implied as might have been given expressly. Since trustee vendors could not properly authorize their solicitor to receive the purchase-money, their solicitor formerly could not receive it under this section. (*Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.) But now, by the Trustee Act, 1888, s. 2, sub-s. (1), p. 313, *post*, it is lawful for trustees to permit a solicitor to receive trust moneys under this section.

One of several trustees cannot be authorized by the others to receive the purchase-money on behalf of all. (*Flower* v. *Metropolitan Board of Works*, 27 Ch. D. 592.) Perhaps if one of the trustees is a solicitor, he might be appointed under the Trustee Act, 1888, s. 2, sub-s. (1), above referred to.

Sect. 57. Sufficiency of forms in Fourth Schedule.

57. Deeds in the form of and using the expressions in the forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.

This section seems to be superfluous. If the forms, interpreted in the light of the Act, are sufficient in themselves to effect their design, there is no obvious necessity to enact that they shall be sufficient; and if they are not sufficient in themselves, there seems to be nothing in this section to give them more validity than they would otherwise have. This may be illustrated by the note on Form (C.), s. 27, p. 87, *ante*. It is possible that a solicitor making use of the forms might be protected from liability, in case of a disaster arising from their use.

Sect. 58. Covenants to bind heirs, &c. [*This marginal note properly re-*

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

C. A. 1881, Sect. 58.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this Act.

lates to the next following section.]

This section seems to be founded upon some misapprehension. It is probable, and seems to have been taken for granted by high authority (Wolstenholme & Turner, Conv. Acts, 3rd ed. p. 106; 4th ed. p. 113), that the only covenants referred to are those which "run with the land." But the naming of the heir, as covenantee, never had any effect upon his right to the benefit of such covenants (*Lougher* v. *Williams*, 2 Lev. 92); unless as evidence that the covenant was intended to endure beyond the life of the particular person named as covenantee; which might be shown equally well by naming the executor; in which case the heir, not the executor, would take the benefit of the covenant. (*Ibid.*) It might be contended that such a covenant cannot now, even by the clearest manifestation of intention, be confined to the lives of the parties. But such a conclusion would be so absurd, that "deemed" will probably be taken to mean "in the absence of any declaration to the contrary." The assigns likewise could sue upon such covenants, even at common law, although not named (Co. Litt. 385 a); at all events, in such cases as *The Prior's Case* (cited in *Spencer's Case*, 5 Rep. 16, at p. 17 a), where the benefit of the covenant runs with the land and the covenantor is a stranger. And though it is doubtful whether at common law the benefit of a covenant by a lessee would pass to an assign of the reversion, there is no reason to suppose that the naming of the assign of the reversion in the covenant had any effect upon his right to sue.

What is the effect of the present enactment is not clear. "The result seems to be that it will be prudent that all covenants relating to land where the burden is intended to run with the land should be made by the covenantor for himself and his assigns." (Wolstenholme & Turner, *ubi supra.*) But the section refers only to the *covenantee,* and seems, therefore, to have no bearing upon covenants made "*for his assigns*" by a *covenantor.* (See the second resolution in *Spencer's Case, supra.*)

The naming of the assigns of the covenantee is often confused with the naming of the assigns of the covenantor; and the mode in which the latter ought to be named is often misunderstood. When a covenantor enters into a covenant *for himself and his assigns,* the covenant will run with the land if it relates to something which, though not then parcel of the thing demised, will become such parcel on performance of the covenant.

The same rules are applicable to the executors, administrators and assigns of the covenantee, in the case of a covenant made for the benefit of a leasehold reversion, as are applicable to the

C. A. 1881, Sect. 58. heirs and assigns of the covenantee, in the case of a covenant made for the benefit of a reversion of inheritance.

Sect. 59. Covenants to extend to heirs, &c. [*This marginal note properly relates to the last preceding section.*]

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

This section only facilitates the *remedy*, without enlarging the *rights*, of the specialty creditor by bond or covenant.

By the common law, real estate descending to the heir by inheritance was not liable for simple contract debts of the ancestor; nor was it liable even for specialty debts, unless in the deed creating the specialty the heirs were expressed to be bound. (Shep. T. 369.) If the heir was so expressed to be bound, he was bound in respect of all lands descending to him from the ancestor in fee simple; but not after the statute *De Donis*, in respect of lands descending in fee tail, because, though these latter descended by inheritance, the power of the owner, *post prolem suscitatam*, to charge lands held for a conditional fee, was taken away by the statute. Estates *pur autre vie* do not descend to the heir by inheritance, but only go to him (when he is properly named in the grant) as special occupant; and they were not, until after the Statute of Frauds, liable even for specialty debts, by which the heir was bound in respect of lands descending to him in fee simple. (*Doe* v. *Luxton*, 6 T. R. 289, at p. 291.) Copyholds were similarly not liable, until the 3 & 4 Will. 4, c. 104. (1 Scriv. Cop. 4th ed. p. 48.)

The claim of the specialty creditor was liable at common law to be defeated by a devise of the realty. The Statute of Fraudulent Devises (3 & 4 Will. & M. c. 14) gave bond creditors an action of debt against the devisee, not being a devisee for the payment of debts. This Act, having been made perpetual by 6 & 7 Will. 3, c. 14, was repealed, but substantially re-enacted and extended to covenants, by 11 Geo. 4 & 1 Will. 4, c. 47.

The Statute of Frauds (29 Car. 2, c. 3) s. 12, amended by the 14 Geo. 2, c. 20, made estates *pur autre vie* devisable; and enacted that, if not devised, they should be chargeable in the

C. A. 1881, Sect. 59.

hands of the heir as assets by descent, as in the case of lands in fee simple; and in default of a special occupant, should go to the personal representatives and be assets in their hands. These enactments were repealed by the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 2, but substantially re-enacted by sects. 3 and 6.

The distinction between specialty and simple contract debts was abolished in respect of debts contracted by any person being at the time of his death a *trader*, by 47 Geo. 3, c. 74; the provisions of which Act were repealed, but amended and re-enacted by the Act 11 Geo. 4 & 1 Will. 4, c. 47, above referred to. These provisions, having been superseded by those of 32 & 33 Vict. c. 46, hereinafter mentioned, are now repealed.

The 3 & 4 Will. 4, c. 104, made all freehold, customaryhold, and copyhold estates, assets to be administered in courts of equity for the payment of simple contract as well as of specialty debts; but with priority in favour of specialty creditors. This priority was abolished by 32 & 33 Vict. c. 46, s. 1; which enacted that, in the administration of the estate of every person dying after the 1st January, 1870, no debt of such person shall be entitled to priority by reason that it is a specialty debt, but that all the creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets, whether such assets are legal or equitable. But the creditor by simple contract, and the creditor by any specialty in which the heirs were not named, had no right of action directly against the heir or devisee, and could enforce their claim only by means of an administration suit in equity; or, after the coming into operation of the Judicature Acts, an administration action. The last-mentioned class of creditors will now, in the absence of special provision to the contrary in the deeds under which they claim, be able to sue directly. Creditors by simple contract must still take proceedings for administration; as to which, see R. S. C. 1883, Ord. LV.

It is possible that the phrase "contract under seal," which seems in this section to be somehow distinguished from "covenant," was meant to include stipulations in deeds which do not actually use the word "covenant," such as provisoes for redemption, agreements, declarations, and the like. This intention seems to have more point in s. 60, p. 138, *post*, where the phrase also occurs, than in the present section. But it is conceived that the "contracts" in question are in fact covenants. The old phrase, "Provided always, and it is hereby agreed and declared," was probably derived from a confusion between the ancient mortgages upon *condition*, and the more modern mortgages subject to a *contract for reconveyance* upon redemption. Since the coming into operation of the present Act, a practice has sprung up in some quarters of cutting the phrase short at "Provided always;"—*i.e.*, shortening it by omitting its most essential feature, the words which directly import a contract. But the words, "provided always," though they are not properly so used, may by themselves imply a covenant. (Prest. Shep. T., 122, 123.)

It was decided in *Spyer* v. *Hyatt*, 20 Beav. 621, that a widow's

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dower had priority over her husband's simple contract debts; apparently upon the ground that whatever was included in the wife's dower was not in truth a part of the husband's real estate descending to the heir. If this decision is correct, it seems to apply to specialty debts as well as to simple contract debts; and there seems to be nothing in 32 & 33 Vict. c. 46, s. 1, to affect the decision. A distinction appears to be drawn in the construction of the Dower Act, 3 & 4 Will. 4, c. 105, s. 5, between a debt to which land is specifically made liable by a charge or contract, and a debt to which land is circuitously made liable by reason of the operation of 3 & 4 Will. 4, c. 104; and this reasoning does not seem to be affected by the subsequent passing of 32 & 33 Vict. c. 46. Of course, if the husband has by his will charged his debts upon his real estate, they will take priority over the dower. (*Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466; *Lacey* v. *Hill*, L. R. 19 Eq. 346.)

Sect. 60.

Effect of covenant with two or more jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

This section does not extend to all covenants made with covenantees jointly, but only to cases in which the covenantees, besides being the persons entitled to sue upon the covenant, are also the persons *to or for whose benefit* the act is to be done. It seems to render unnecessary the insertion of "the survivors or survivor of them, their or his assigns, or the heirs, executors, or administrators of such survivor," and similar expressions, to denote the persons other than those originally specified, who may *require* a stipulation to be performed, when such persons are also the persons who may *sue the person liable* to perform it, if he should make default.

C. A. 1881, Sect. 61.

Effect of advance on joint account, &c.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act.

Though at law a joint debt belonged to the survivors or survivor of several mortgagees, the presumption in equity was that money advanced by several persons was owned by them for several interests, and, in the absence of a declaration to the contrary, the survivors alone could not give a receipt. (See Fisher on Mortgages, 3rd ed. par. 1286, 4th ed. par. 1239; Coote on Mortgages, 4th ed. pp. 302, 1038, 5th ed. pp. 332, 1123.)

This section reverses the presumption. Before its enactment, it was necessary in mortgages to state on the face of the deed that the advance was made out of money belonging to the lenders on a joint account "in equity as well as at law." The words "in equity as well as at law" may now be omitted; but the advance may still appropriately be expressed to be made out of, or as, money belonging to the lenders on a joint account.

The provision at the end of sub-s. (1) allows a mortgagor, or obligor, to disregard notice of a severance of the joint account. There is no reason why he should be hampered by notices, the

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effect of which would be to involve him in responsibilities not contemplated in the original bargain.

Sect. 62. Grants of easements, &c. by way of use.

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(2.) This section applies only to conveyances made after the commencement of this Act.

Easements might always be created *de novo* by express grant, and the whole doctrine (see note on s. 6, p. 21, *ante*) of implied grant by the use of general words rests upon this fact. Even a covenant would operate as a grant in favour of the covenantee. (*Holmes* v. *Seller*, 3 Lev. 305; *Shove* v. *Pincke*, 5 T. R. 124, at p. 129.)

It is the most essential characteristic of an easement, that it is enjoyed in respect of the ownership of a dominant tenement over or in respect of a servient tenement. Easements are not incorporeal hereditaments, but appurtenant rights. A right which would be an easement if it were enjoyed in respect of a dominant tenement is, if there be no such tenement to which it can be appurtenant, a right which, unless it is coupled with an interest in the land over which it is enjoyed, is no more than a mere licence. A mere licence is revocable at will, and is a personal right which is incapable of assignment; though, until revoked, it would justify a trespass, and such revocation must be upon reasonable notice. (*Mellor* v. *Watkins*, L. R. 9 Q. B. 400.) A licence which is coupled with the grant of an interest in the land to which it refers, is not revocable, if and in so far as such revocation would defeat the grant of the interest. (See *Wood* v. *Leadbitter*, 13 M. & W. 838, at p. 845.)

Garden rights are of common occurrence in London. They are usually provided for by the insertion of a common clause, drawn in the form of a grant, in all the leases of the neighbouring houses. Such forms would perhaps have more certain efficacy, if accompanied by a covenant not to revoke the licence contained in the grant, and to do nothing to interfere with the use of the land in accordance with the licence.

It was probably not intended by this section to permit the creation of any right which could not formerly have been created, but only to provide a more convenient method of creation. Formerly, an easement could be created by way of direct grant, and now it can also be created by way of use.

C. A. 1881, Sect. 62.

This enables limited owners, taking under a settlement effected by conveyance to uses, to grant easements under a power. So far, this enactment is now superseded by s. 20, sub-s. (1), of the S. L. Act, 1882, p. 218, *post*, except in regard to powers conferred by the settlement which may be in excess of those conferred by the last-mentioned Act. But it is still useful, enabling a vendor expressly to retain a right of way created *de novo*, without the purchaser executing the conveyance. See also the S. L. Act, 1882, s. 24, sub-s. (7), p. 235, *post*.

The section does not alter or extend the incidents of a right or licence; and a right which was formerly revocable or incapable of transmission or assignment will now, it is conceived, have no larger capabilities than it had before. It is difficult to suppose that special privileges are in future to be conceded, if a right happens to be created by way of use, and refused, if it happens to be created by way of grant.

As to statutory rights not appurtenant to any tenement, which have sometimes improperly been called easements, see note on the S. L. Act, 1882, s. 2, sub-s. (10), (i.), p. 189, *post*.

Sect. 63. Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.

By s. 2, sub-s. (v.), p. 4, *ante*, "conveyance" includes "lease . . . . made by deed on a . . . . demise." But it will probably be held that sub-s. (2) of the present section suffices, without any direct expression of a "contrary intention," to prevent a demise made by an owner in fee simple from passing all his estate; though its language is not very well suited to the purpose.

There seems to be no ground for concluding that, if a fee simple should pass in the premisses of a lease by virtue of this section, the effect of the premisses would be controlled by the *habendum*. It is true that, previously to the 8 & 9 Vict. c. 106, because the limitation of an immediate fee simple in the premisses of a deed could not have taken effect without livery of seisin, while the limitation of a term of years in the *habendum* could take effect by the mere delivery of the deed, the premisses

C. A. 1881, Sect. 63.

would, in such a case, have been controlled by the *habendum;* or rather the estate limited in the *habendum* would have taken effect, while that limited in the premisses would not; as was decided, upon those very grounds, in *Baldwin's Case,* 2 Rep. 23 a; see the 4th resolution at p. 24 a. (On the subject generally, see Challis, R. P., 333—336.) But now that the estate supposed to be contained in the premisses lies in grant, and would pass by mere delivery of the deed, the reasons given for the controlling of the premisses by the *habendum* are entirely wanting; and the supposed limitation seems to fall within the different principle laid down in the 1st and 2nd resolutions in that case, and the *habendum* therefore to be "repugnant and void."

Buckler's Case (2 Rep. 55 a) seems to have no bearing upon the question under consideration. There the premisses did not convey or limit a *fee simple*—which is necessary to make the case relevant to this discussion—but contained only a bare grant "to C.;" and the decision went expressly upon the ground that "*no certain estate*" was "contained in the premisses." For the same reason, the passage in Co. Litt. 183 a, which has been sometimes cited in this connection, is entirely beside the point. The same remark applies to Shep. T. 113; where Preston, in his additions to the text, takes the law to be as above stated.

Sect. 64. Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females as the case may require.

XIII.—Long Terms.

Sect. 65. Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged

into a fee simple in the manner, and subject to the restrictions, in this section provided. C. A. 1881, Sect. 65.

As to the power given by the Trustee Act, 1888, s. 9, to invest trust moneys upon mortgages of long terms, see p. 321, *post*.

Sect. 11 of the Conv. Act, 1882, p. 180, *post*, enacts, that the present section shall be deemed not to have included (i.) any term liable to be determined by re-entry for condition broken; or (ii.) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

Rent incident to the reversion on a term of years is not capable of becoming "barred by lapse of time" during the continuance of the term. In *Doe* v. *Prosser*, Cowp. 217, length of time was held to afford sufficient presumption of an *ouster* by one tenant in common of another; but there can be no ouster of the reversioner by a termor for years, who is estopped from denying the reversioner's title. Such ouster, if made possible by 3 & 4 Will. 4, c. 27, s. 9, applies only in the case of rents not less than twenty shillings a year, and is effected, not by mere non-payment, but by payment to an adverse claimant of the reversion. And though in *Eldridge* v. *Knott*, Cowp. 214, Lord Mansfield said (p. 215) that "There are many cases not within the Statute [of Limitations] where, from a principle of quieting possession, the Court has thought that a jury should presume anything to support a length of possession;" the phrase, "a length of possession," seems hardly appropriate to describe "a length of time during which a rent has not been paid." In the last-cited case the rent was a quit rent, which is within the Statute of Limitations, not a rent incident to a reversion, which is not.

The reversions contemplated by this section have in some cases a substantial value, which the termor is now enabled to appropriate without compensation.

The mere fact that a rent is so small that it is not actually demanded and is not saleable, will not make it a "rent having no money value" within the meaning of this enactment. (*Re Smith and Stott*, 29 Ch. D. 1009, n.; 31 W. R. 411.) But the reservation of a nominal rent, such as a silver penny, expressed to be payable "if lawfully demanded" (upon which words stress was laid by the Court), will not exclude the section; such a reservation being presumed to have been intended to have no money value, but only to be evidence of a tenancy. (*Re Chapman and Hobbs*, 29 Ch. D. 1007.)

It is possible that the curious provision in s. 15 of Lord Cranworth's Act (see note on s. 21, *ante*) was intended to effect, in many cases, the same purpose as the present section, by enabling any mortgagee possessed of a long term, which had been created by an owner in fee simple, to convey the fee simple upon a sale effected under the power of sale conferred by that Act. Mortgages effected by means of demises for long terms by owners in fee simple were formerly common; and it is probable that such mortgages, the terms having been sold by the mortgagees, afford the most common origin of the long terms contemplated by this section.

C. A. 1881, Sect. 65.

Some practitioners combine a declaration enlarging a long term with a conveyance; and it is stated that when this is done, the Commissioners of Inland Revenue require a ten-shilling stamp to be affixed in addition to the *ad valorem* duty in respect of the conveyance. (See 27 Sol. Journ. 465.) It is conceived that the declaration and the conveyance are clearly "several distinct matters," within the meaning of the Stamp Act, 1870, s. 8, sub-s. (1). (See *Hadgett* v. *Commissioners of Inland Revenue*, 3 Ex. D. 46.) But the impropriety of combining them in one deed is obvious; and the validity of such a conveyance is open to grave doubt. The whole deed takes effect *uno flatu*, and if the conveyance should take effect, it is impossible to see how "the person in whom the term was vested," could *acquire* and *have* in the land a fee simple instead of the term. See sub-s. (3), *infra*, and note thereon.

(2.) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

The language of this sub-section includes three cases:—(1) a legal owner beneficially entitled; (2) a legal owner entitled as trustee; (3) a legal owner entitled as personal representative of a deceased owner. An equitable owner, the term being vested in trustees, is clearly not within its language, since he is entitled in right of the trust, not in right of the term; and there is no necessity to suppose that his case is within the Act's intention,

since a sufficient meaning can otherwise be assigned to all the language used. C. A. 1881, Sect. 65.

The fact that, by s. 2, sub-s. (iii.), *ante*, possession includes receipt of income, seems to have little bearing upon the question. It might enable an equitable owner to be included, in cases where the language is otherwise appropriate; but hardly in a case where the language is otherwise very inappropriate and there is no necessity for including him. The receipt of income by a legal owner gives a sufficient meaning to the language used.

Moreover, since the trustee, "being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale," would clearly have power to enlarge the term, it follows, upon the hypothesis that the *cestui que trust* for the time being entitled to the income in right of the trust, also has power to enlarge, that there would exist at the same time two independent persons, each separately having the power. This would be anomalous and inconvenient; and gives a look of improbability to the hypothesis upon which it rests.

It will therefore be prudent not to assume that an equitable owner, whether tenant for life or otherwise, has power to enlarge the term. A legal tenant for life clearly has the power.

A legal tenant for life of a term, with a quasi-remainder over, can be created by will (*Mat. Manning's Case*, 8 Rep. 94; *Lampet's Case*, 10 Rep. 46), though not by deed. (See also *Wilkinson* v. *South*, 7 T. R. 555.) The quasi-remainder is an executory devise. Settlements of long terms are usually effected by trusts.

The mortgagor of a long term, when the mortgage is by demise, seems to have power to enlarge the term, whether he is or is not "mortgagor in possession;" because, even though possession should be taken by the mortgagee under the demise, this would not deprive the mortgagor of his title under the term itself.

When the mortgage is by assignment, the mortgagor seems to have power to enlarge only while in possession; for when out of possession he is not "beneficially entitled in right of the term."

A mortgagee by demise, and a mortgagee by assignment not in possession, clearly have no power to enlarge. Whether a mortgagee by assignment in possession has the power is a difficult question. The answer seems to depend upon whether he is "beneficially entitled" within the meaning of sub-s. (2), (i.). If he is not, certainly no one else is; so that, upon that supposition, the beneficial title would be in abeyance. But it would not be prudent, in the absence of judicial decision, to accept a title depending upon an enlargement effected by such mortgagee.

It is apprehended that an ineffectual attempt to enlarge a term under this section would be a mere nullity, and would not operate a forfeiture of the term. Now that, by 8 & 9 Vict. c. 106, s. 4, the tortious operation of feoffments is abolished, there seems to be no conveyance *in pais* by which a forfeiture can be incurred. See on this subject, 4 Bac. Abr. 884, *Leases and Terms of Years*, T. 2.

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(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

It is (at the least) very doubtful whether the fee simple, into which the term is enlarged, can be conveyed, or settled, by the deed effecting the enlargement. The Act contains nothing to warrant such a proceeding, and it must not be assumed that the Courts will make the necessary additions.

Since there cannot be two fees simple in the same land, it seems that the estate of the reversioner is absolutely destroyed. It cannot be transferred to the termor, because such transfer would operate as a merger, not an enlargement. The only alternative is to suppose that the reversion in fee simple continues in existence, and that the fee simple created by enlargement subsists as a base fee. (Upon this question, see Challis, R. P. 272.)

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

This sub-section enables many burdens to be imposed at law upon a fee simple, which have hitherto been possible only in equity and with notice, under the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774. A long term can be created, to the intent that it shall be enlarged into a fee simple by the termor. And there is nothing to restrict the covenants here mentioned to negative covenants, to which the principle of *Tulk* v. *Moxhay* is restricted. (*Haywood* v. *Brunswick, &c. Building Society*, 8 Q. B. D. 403.) It is probable that the sub-section was intended to apply only to trusts, &c., to which the term has been subjected since its creation. But it contains nothing to restrict its operation within such an intention.

The question might be raised, whether the burden of covenants annexed to a fee simple acquired by enlargement, endures only so long as the term would have endured if it had not been enlarged, or during the continuance of the fee simple. Since the new fee simple is in fact the old term (the latter being enlarged, not merged) it would seem that the covenants remain annexed to the term under its new shape, and therefore, if otherwise valid, endure for ever. But if the covenants should be expressed to be binding only during the continuance of the term, it is conceived that this phrase would be taken to mean a specific time marked out for the purpose, which would not be enlarged with the

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enlargement of the term. A difficult question may perhaps arise in this connection with reference to the covenants for title; which are binding for a longer period than the term, and would be binding for ever but for the Statute of Limitations, but which only purport to warrant the term.

The question may also arise, if it shall be decided that the estate of the reversioner is destroyed, whether the benefit of such covenants will pass, though without the reversion, to the heir of the reversioner.

If the termor, as such, is entitled to the benefit of any covenant on the part of the reversioner, there is no provision in the section for its preservation. It would, therefore, seem to be destroyed, if the reversioner's estate to which it was annexed is destroyed. But such covenants are not usually found in connection with the terms contemplated by this section.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

If chattels, or any chattel interest, be settled, either directly upon trusts resembling the limitations in a strict settlement of lands, or indirectly by reference to such limitations, the first quasi-tenant in tail of the chattels, or the first tenant in tail of the lands by reference to which the chattels are settled, who attains an indefeasibly vested interest or estate, becomes absolutely entitled to the chattels. (*Foley* v. *Burnell*, 4 Bro. P. C. 319; *Vaughan* v. *Burslem*, 3 Bro. C. C. 101; *Carr* v. *Lord Erroll*, 14 Ves. 478.) Lord Romilly, M. R., held, in *Hogg* v. *Jones*, 32 Beav. 45, that if the estate of the tenant in tail is liable to be devested by the coming *in esse* of a tenant in tail of an elder branch, the chattels will not vest in him during the contingency; so that, if he dies pending the contingency, no claim to the chattels can pass to his personal representative. But Kay, J., though he did not deny that the last-cited case was rightly decided, seems to have thought that it ought to have been decided upon the particular wording of the will out of which it

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arose; and he held, in *Parkin* v. *Cresswell*, 24 Ch. D. 102, that the chattels, pending the contingency, will vest for a transmissible interest in such a tenant in tail, so that, if the estate tail should eventually become indefeasibly vested, the claim of the personal representative to the chattels will become absolute.

The addition of the words, "so far as the rules of law and equity will permit," have no effect to prevent the absolute vesting of the chattels in a tenant in tail or quasi-tenant in tail, in whom they would otherwise have vested absolutely. (*Rowland* v. *Morgan*, 2 Ph. 764, where the opinion of Lord Hardwicke to the contrary, expressed in *Lord Deerhurst* v. *Duke of St. Alban's*, 5 Madd. 232, and *Gower* v. *Grosvenor*, 5 Madd. 337, was thought to have been clearly overruled. See also *Harrington* v. *Harrington*, L. R. 5 H. L. 87, at p. 107.)

The absolute vesting of the chattels in manner above mentioned can be postponed or prevented by a clear expression of intention; but such expression of intention must comply, in point of clearness and certainty, with the rules which govern conditions subsequent at common law, of which clearness and certainty were prominent characteristics; and, therefore, if the contingency upon which the vesting depends is of so peculiar a nature that it is impossible, during a period of time, to say whether the contingency has happened or not, the restriction will be void. (*Re Viscount Exmouth*, 23 Ch. D. 158.)

See further as to settled chattels, note on the S. L. Act, s. 37, p. 256, *post*.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement had not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

XIV.—Adoption of Act.

Sect. 66. Protection of solicitor and trustees adopting Act.

66.—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by

C. A. 1881, Sect. 66.

or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

The several distinctions appearing in the language of the first sub-section must be carefully noticed. It speaks of—

(a) *Powers* given to a *person;*

(b) *Covenants, provisions, stipulations* and *words* to be deemed *included* or *implied* in an *instrument;*

(c) Covenants, provisions, stipulations and words *made applicable* to a *contract for sale* or *other transaction.*

The section is therefore confined to powers, and to covenants, &c., either "deemed included or implied" in instruments, or made applicable to transactions. Under special circumstances, it may, notwithstanding this section, be a breach of duty on the part of a solicitor to omit to exclude the operation of s. 17, p. 57, *ante* (on the consolidation of mortgages); and to such cases the present section does not seem to apply. The rule as to consolidation is a new rule of law, which may be negatived if circumstances render it prudent so to do. The *omission to negative* the rule cannot aptly be styled "a provision applicable to a transaction;" still less (if possible) is it a "covenant," or a "stipulation," or a "word."

XV.—Miscellaneous.

Sect. 67. Regulations respecting notice.

67.—(1.) Any notice required or authorized by this Act to be served shall be in writing.

C. A. 1881, Sect. 67.

(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the Court.

The notices required or authorized by the Act are mentioned in sects. 14, 20, and 45, *ante*.

Apart from this section, a mortgagee's notice may be affixed to the door of a vacant house. (Fisher on Mortgages, 3rd ed. par. 801, 4th ed. par. 756; Coote on Mortgages, 4th ed. p. 249, 5th ed. p. 274.)

Sect. 68. Short title of 5 & 6 Will. 4, c. 62.

68. The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by

virtue of that Act, or in any other document, or in any Act of Parliament. C. A. 1881, Sect. 68.

XVI.—Court; Procedure; Orders.

69.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court. Sect. 69. Regulations respecting payments into Court and applications.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at Chambers.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly. 39 & 40 Vict. c. 59, s. 17.

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General Rules, and Rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this

C. A. 1881, Sect. 69.

Act, to take effect on or after the commencement of this Act.

Sub-s. (3) is not merely permissive. (See *Re Lillwall's Settlement Trusts*, W. N. 1882, p. 6.)

But the sub-section is only directory, and the penalty for bringing a matter before the Court in any other way affects the question of costs only. (*Ex parte Thompson*, 28 Sol. Journ. 274.) This point is not noticed in the report in W. N. 1884, p. 28.

Sects. 5, 9, 24, 25, sub-s. (3), and 42, *ante*, provide for applications which come under this sub-section.

Applications under s. 14, *ante*, suppose that the proceedings there contemplated are taken by or in an action, and it does not seem to be intended that the main issue should be tried on a summons in chambers. A similar remark applies to s. 25, sub-s. (2), p. 81, *ante*.

Sub-sects. (4) and (5) refer to applications for the discharge of incumbrances on sales; as to which, see s. 5, p. 15, *ante*.

There is no doubt that great inconvenience has been caused by the provision, that applications under this Act, many of them being of a very novel character, shall be heard in chambers; and there has hitherto been a diversity in the practice before different judges upon more than one point of importance. As to applications under the S. L. Act, 1882, see s. 46, sub-s. (3) of that Act, p. 269, and Rules made thereunder, p. 375, *post*.

As to applications to appoint trustees for the purposes of s. 42, see note thereon, p. 110, *ante*.

Sect. 70. Orders of Court conclusive.

70.—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

40 & 41 Vict. c. 18, s. 40.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has, before the commencement of this Act, been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of

this Act pending for having it set aside or determined to be invalid. C. A. 1881, Sect. 70.

The words "under any statutory or other jurisdiction" mean "*purporting to be* under," &c. An order will not be invalidated as against a purchaser, although it shows on its face that it was made *ultra vires*. (*Re Hall Dare's Contract*, 21 Ch. D. 41.)

It seems that, under the Settled Estates Act, 1857, 19 & 20 Vict. c. 120, s. 28, a purchaser, after the execution of a conveyance pursuant to an order of the Court, would have obtained an indefeasible title, notwithstanding that the Court had exceeded its jurisdiction in making the order. (*Re Thompson, Green* v. *Thompson*, Johns. 418.)

It is conceived that the Court, relying upon the general principles of its jurisdiction, would not permit a purchaser to avail himself of an order obtained by fraud, of which he had notice at the time of the purchase.

It is possible that the Court, upon similar grounds, would not, in spite of the sweeping language of sub-s. (1), permit a purchaser to avail himself of an order obtained by fraud, even though he had no notice thereof. The aim of the section may be to place upon a legal basis, and to adapt to the present state of the law, the old doctrine of equity, that no relief in equity could be obtained as against a purchaser for value without notice, and to extend the doctrine, in the cases here contemplated, to purchasers with notice. But the latest and most carefully considered authorities (in opposition to some of earlier date) lay it down that, under this principle, even a purchaser for value without notice could not retain any advantage which had been obtained by the fraud of another person without his privity. (*Eyre* v. *Burmester*, 10 H. L. C. 90; *Heath* v. *Crealock*, L. R. 10 Ch. 22.)

With reference to the equitable defence of purchase for value without notice, it must be remembered that this no longer affords a defence against a claim for discovery. (*Ind, Coope & Co.* v. *Emmerson*, 12 App. Cas. 300.)

XVII.—Repeals.

71.—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed. Sect. 71. Repeal of enactments in Part III. of Second Schedule; restriction on all repeals.

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no

C. A. 1881, Sect. 71.

such repeal in this Act; but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.

It may probably be assumed that the rights and powers conferred by Lord Cranworth's Act will not be deemed to be extinguished, so far as concerns instruments coming into operation between the passing of that Act and the coming into operation of the present Act, though it might certainly be objected that such rights and powers are an "operation, effect or consequence" of the Act, and not of the instruments sought to be affected. This conclusion, however, does not apply to those sections, such as s. 43, p. 113, *ante*, which are expressly extended to instruments coming into operation before the commencement of the Act; see *Re Dickson, Hill* v. *Grant*, 29 Ch. D. 331, at pp. 338, 340.

The repeal clause (s. 13) of the Conv. Act, 1882, contains some additional words, of which the intention would have been more plain if they had appeared in the present section.

XVIII.—Ireland.

Sect. 72. Modifications respecting Ireland.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act may direct that any of those matters be assigned to the Land Judges of that Division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

40 & 41 Vict. c. 57, s. 69.

Sect. 73. Death of

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after

the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

C. A. 1881, Sect. 73.

bare trustee intestate, &c. 37 & 38 Vict. c. 78.

The V. & P. Act, 1874, is printed, with notes, p. 393, *post*.

SCHEDULES.

THE FIRST SCHEDULE.

C. A. 1881, Sched. 1.

ACTS AFFECTED.

PART I. (*a*).

1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognizances.

28 & 29 Vict. c. 104.—The Crown Suits, &c. Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

PART II.

5 & 6 Will. 4, c. 62.—An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various Departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.

(*a*) The clause to which Part I. of this schedule was intended to refer does not appear in the Act. It is now included in the Conv. Act, 1882, s. 2, *post*.

C. A. 1881, Sched. 2.

THE SECOND SCHEDULE.

Repeals.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

Part I.

22 & 23 Vict. c. 35.	An Act to further amend the law of property and to relieve trustees	in part; namely,—
in part.	Sections four to nine.	
23 & 24 Vict. c. 126.	The Common Law Procedure Act, 1860	in part; namely,—
in part.	Section two.	

Part II.

15 & 16 Vict. c. 86.	An Act to amend the practice and course of proceeding in the High Court of Chancery	in part; namely,—
in part.	Section forty-eight.	

Part III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property.	
23 & 24 Vict. c. 145.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills ..	in part; namely,—
in part.	Parts II. and III. (sections eleven to thirty.)	

Sched. 3.

THE THIRD SCHEDULE.

Statutory Mortgage.

Part I.

Deed of Statutory Mortgage.

This Indenture made by way of statutory mortgage the day of 1882 between A. of [&c.] of the one part and M. of [&c.] of the other part Witnesseth that in consideration of the sum of £ now paid to A. by M. of which sum A. hereby acknowledges the receipt A. as mortgagor and as beneficial owner hereby conveys to M. all that [&c.] To hold to and to the use of M. in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum (*b*).

In witness &c.

*** Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.

(*b*) The words *as mortgagor* imply the covenants mentioned in s. 26, *ante*. The words *as beneficial owner* imply those mentioned in s. 7, sub-s. (1), (C) and (D), *ante*.

C. A. 1881, Sched. 3.

PART II.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between M. of [&c.] of the one part and T. of [&c.] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WITNESSETH that in consideration of the sum of £ now paid to M. by T. being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum M. hereby acknowledges the receipt M. as mortgagee hereby conveys and transfers to T. the benefit of the said mortgage (*c*).

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between A. of [&c.] of the first part B. of [&c.] of the second part and C. of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WITNESSETH that in consideration of the sum of £ now paid to A. by C. being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum A. hereby acknowledges the receipt A. as mortgagee with the concurrence of B. who joins herein as covenantor hereby conveys and transfers to C. the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between A. of [&c.] of the 1st part B. of [&c.] of the 2nd part and C. of [&c.] of the 3rd part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WHEREAS the principal sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS B. is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to A. by C. of which sum A. hereby acknowledges the receipt and B. hereby acknowledges the payment and receipt as aforesaid* A. as mortgagee hereby conveys and transfers to C. the benefit of the said mortgage AND THIS INDENTURE ALSO

(*c*) For the meaning of the word *supplemental*, see s. 53, *ante*.

C. A. 1881, Sched. 3.

WITNESSETH that for the same consideration A. as mortgagee and according to his estate and by direction of B. hereby conveys and B. as beneficial owner hereby conveys and confirms to C. All that [&c.] To hold to and to the use of C. in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* insert* and also in consideration of the further sum of £ now paid by C. to B. of which sum B. hereby acknowledges the receipt, *and after* of *at* † *insert* the sums of £ and £ making together] (*d*).

*** Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.

PART III.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between C. of [&c.] of the one part and B. of [&c.] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [&c.] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest C. hereby acknowledges the receipt C. as mortgagee hereby conveys to B. all the lands and hereditaments now vested in C. under the said indenture To hold to and to the use of B. in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** Variations as noted above.

Sched. 4.

THE FOURTH SCHEDULE.

SHORT FORMS OF DEEDS.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between A. of [&c.] of the one part and B. of [&c.] and C. of [&c.] of the other part WITNESSETH that in consideration of the sum of £ paid to A. by B. and C. out of money belonging to them on a joint account of which sum A. hereby acknowledges the receipt A. hereby covenants with B. and C. to pay to them

(*d*) Upon the omission from form (C) of the words *as mortgagor*, see note on s. 27, p. 87, *ante*.

on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to B. and C. interest thereon at the same rate by equal half-yearly payments on the day of and the day of And this Indenture also witnesseth that for the same consideration A. as beneficial owner hereby conveys to B. and C. All that [&c.] To hold to and to the use of B. and C. in fee simple subject to the proviso for redemption following (namely) that if A. or any person claiming under him shall on the day of 1882 pay to B. and C. the sum of £ and interest thereon at the rate aforesaid then B. and C. or the persons claiming under them will at the request and cost of A. or the persons claiming under him re-convey the premises to A. or the persons claiming under him And A. hereby covenants with B. as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

This Indenture made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [&c.] Witnesseth that in consideration of the further sum of £ paid to A. by B. and C. out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to B. and C. of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

This Indenture made the day of 1883 between A. of [&c.] of the 1st part B. of [&c.] and C. of [&c.] of the 2nd part and M. of [&c.] of the 3rd part Whereas by an indenture dated [&c.] and made between [&c.] the lands hereinafter mentioned were conveyed by A. to B. and C. in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [&c.] and made between the same parties those lands were charged by A. with the payment to B. and C. of the further sum of £ and interest thereon And whereas a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as B. and C. hereby acknowledge Now this Indenture witnesseth that in consideration of the sum of £ paid by the direction of A. to B. and C. and of the sum of £ paid to A. those two sums making together the total sum of £ paid by M. for the purchase of the fee simple of the lands hereinafter

C. A. 1881, Sched. 4.

mentioned of which sum of £ B. and C. hereby acknowledge the receipt and of which total sum of £ A. hereby acknowledges the payment and receipt in manner before mentioned B. and C. as mortgagees and by the direction of A. as beneficial owner hereby convey and A. as beneficial owner hereby conveys and confirms to M. All that [&c.] To hold to and to the use of M. in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add if required* And A. hereby acknowledges the right of M. to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*

This Indenture made the day of 1882 between John M. of [&c.] of the 1st part Jane S. of [&c.] of the 2nd part and X. of [&c.] and Y. of [&c.] of the 3rd part Witnesseth that in consideration of the intended marriage between John M. and Jane S. John M. as settlor hereby conveys to X. and Y. All that [&c.] To hold to X. and Y. in fee simple to the use of John M. in fee simple until the marriage and after the marriage to the use of John M. during his life without impeachment of waste with remainder after his death to the use that Jane S. if she survives him may receive during the rest of her life a yearly jointure rent-charge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rent-charge to the use of X. and Y. for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of John M. and Jane S. successively according to seniority in tail male with remainder [*insert here, if thought desirable*, to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of John M. and Jane S. in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of John M. in fee simple [*Insert trusts of term of five hundred years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness &c.

THE CONVEYANCING ACT, 1882.

Amended, 55 & 56 Vict. c. 13. 1892.

(45 & 46 Vict. c. 39.)

An Act for further improving the Practice of Conveyancing; and for other purposes.

[10th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Sect. 1. Short titles; commencement; extent; interpretation. 44 & 45 Vict. c. 41.

1.—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881), and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

The abbreviated "short title" of the Act of 1881 is not authorized to be used outside the limits of the present Act.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

C. A. 1882, Sect. 1.

(4.) In this Act and in the schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

The definition of "property" varies from that which is given in the interpretation clause (s. 2, sub-s. i.) of the Conv. Act, 1881, p. 2, *ante*. The words "and any estate or interest in any property, real or personal," are omitted, and the words "any other right or interest in the nature of property whether in possession or not" are substituted for the words "any other right or interest."

The word "property" occurs only in the sub-sub-section next following, and in s. 12, p. 180, *post*.

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser;

Compare the Conv. Act, 1881, s. 2, sub-s. (viii.), p. 5, *ante*.

3 & 4 Will. 4, c. 74.

(iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance" is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

4 & 5 Will. 4, c. 92.

Searches.

Sect. 2. Official negative and other certificates of searches for

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made

in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881, or by any other Act, he may deliver in the office a requisition in that behalf, referring to this section. C. A. 1882, Sect. 2. judgments, crown debts, &c.

The following list will show the sections of the scheduled Acts which are principally referred to:—

(1) 1 & 2 Vict. c. 110, ss. 11, 13, 18, 19, 22.
(2) 2 & 3 Vict. c. 11, ss. 4, 5, 7.
(3) 18 & 19 Vict. c. 15, ss. 4—7, 11, 12.
(4) 22 & 23 Vict. c. 35 (Lord St. Leonards' Act, 1859), s. 11 (Release of part of land charged not to affect validity of judgment as to remaining part), and s. 22 (Provisions as to re-registration to apply to Crown debts).
(5) 23 & 24 Vict. c. 38 (Lord St. Leonards' Act, 1860), ss. 1—5.
(6) 23 & 24 Vict. c. 115, both sections.
(7) 27 & 28 Vict. c. 112, ss. 3, 4.
(8) 28 & 29 Vict. c. 104, ss. 48, 49.
(9) 31 & 32 Vict. c. 54, ss. 1—3.

The charges with which these enactments deal, comprise judgments (including orders of courts), Crown debts, lis pendens, rent-charges (under the Improvement of Land Act, 1864), annuities, and writs of execution and extent.

The law as to judgments, &c., is conveniently summarized in Prideaux, Conv. Prec. 12th ed. vol. I., pp. 137 *et seq.* See also Dart, V. & P. Ch. XI.

The registration of writs and orders affecting land, under the foregoing Acts, will probably be superseded in future by the Land Charges, &c. Act, 1888, s. 5, sub-s. (4); see note, *infra*.

The Central Office was established, and the business of registration referred to in the above-cited enactments was transferred thereto, by the Supreme Court of Judicature (Officers) Act, 1879, 42 & 43 Vict. c. 78.

By the Rules of the Supreme Court, 1883, Order LXI., r. 23 (No. 916), re-enacting the former Rules of the Supreme Court, Order LXA. r. 8a, it is provided as follows:—

"The Clerk of Enrolments, and each of the following Registrars, namely—(*a*) The Registrar of Bills of Sale; (*b*) The Registrar of Certificates of Acknowledgment of Deeds by Married Women; (*c*) The Registrar of Judgments; shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search."

This section does not apply to searches in the registries of register counties, or to searches for judgments of the Court of Common Pleas of the County of Lancaster. As to inrolments, see sub-s. (11), *infra*.

As to searches in the Office of Land Registry, pursuant to the Land Charges, &c. Act, 1888, see s. 5 of that Act, p. 354, *post*. This Act gravely affects the operation of the above-mentioned enactments, so far as writs and orders affecting land are con-

C. A. 1882, Sect. 2.

cerned. By s. 17 of the same Act, the provisions of the present section are, with some modifications, extended to searches made under that Act.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

See the definition of "purchaser," s. 1, sub-s. (4), (ii.), p. 162, *ante*.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

It is difficult to say what is meant by the odd phrase "for the purposes of this section." No "purposes" are explicitly specified; and those matters which might be conjectured to be "purposes," such as, for example, the substitution of a vicarious for a personal search, or the making official certificates to be conclusive evidence, do not give any sense to the passage in which the phrase occurs. The form of application officially prescribed (see Form II., p. 368, *post*) seems to assume that the purposes of this section are sales, mortgages, leases, and the like.

(5.) General Rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which Rules shall be deemed Rules of Court within sec-

tion seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

C. A. 1882, Sect. 2.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

For rules and forms under this section, see pp. 366, 368, *post*.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any Rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such Rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

As to the liability of a solicitor who neglects to make proper searches, see Dart, V. & P. Ch. XI. sect. 2.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory rule.

3 & 4 Will. 4, c. 74.

This exception will also extend to deeds inrolled under the S. L. Act, 1882, s. 16, p. 213, *post*; and under the Acts relating to charities, 9 Geo. 2, c. 36, 24 & 25 Vict. c. 9, and 35 & 36 Vict. c. 24; and to awards under the Inclosure Acts. Probably also to bargains and sales inrolled under the 27 Hen. 8, c. 16;

C. A. 1882, Sect. 2.

though these are not properly *deeds*, but only sealed and indented *memoranda*.

(12.) This section does not extend to Ireland.

Notice.

Sect. 3. Restriction on constructive notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

"Purchaser" includes a mortgagee and a lessee. (See s. 1, sub-s. 4, ii. p. 162, *ante*.)

It is conceived that the effect of this section will be rather to define than greatly to alter the existing law.

In *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460, at p. 473, Lord Cranworth says: "The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

Constructive notice has been defined as knowledge which the Court imputes to a person upon a presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated. (*Hewitt* v. *Loosemore*, 9 Ha. 449, at p. 455.) See further, as to constructive notice, Dart, V. & P. Ch. XV. sect. 5; Coote on Mortgages, 4th ed. pp. 776 *et seq.*; 5th ed. pp. 845 *et seq.* See, also, *Kettlewell* v. *Watson*, 21 Ch. D. 685, and cases there cited.) The decision in *Kettlewell* v. *Watson* was reversed on appeal, 26 Ch. D. 501; but upon the facts, and not upon any question of law.

A purchaser who does not investigate a title is affected with notice of what he would have learned by investigation, as such neglect tends to promote fraud (*Worthington* v. *Morgan*, 16 Sim. 547); and in cases of fraud, wilful neglect will render a purchaser liable to the consequences of presumption of notice, even though there be direct evidence to the contrary. But such a purchaser is not affected by notice of matters, which he could not have learned without inquiring into the truth of recitals contained in the documents of title, or otherwise going behind the documents themselves. (*Dunning* v. *Earl of Gainsborough*, W. N. 1885, p. 110; 54 L. J. Ch. 991.)

But a purchaser for value without notice is not hindered from availing himself of the legal estate to protect himself, by the fact that a fraud of which he was ignorant appears upon the title, if his ignorance of the title was not due to his own laches. Under such circumstances there seems to be no constructive notice of

things appearing upon the title. (*Pilcher* v. *Rawlins*, L. R. 7 Ch. 259.)

A *puisne* incumbrancer cannot, after receiving notice of a prior *puisne* incumbrance, obtain priority by getting in the legal estate from a bare trustee. (*Harpham* v. *Shacklock*, 19 Ch. D. 207.)

The section will not discharge a purchaser from the effect of such notice as is implied by possession or tenancy of land, or possession of title deeds.

(ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

The words, "in the same transaction," which are founded upon the doctrine expounded by Lord Hardwicke in *Worsley* v. *Earl of Scarborough*, 3 Atk. 392, are emphatic.

In general, notice to a solicitor is notice to his client only when the notice was given after and during the retainer. But if the same solicitor is acting both for a vendor and a purchaser, or a mortgagor and a mortgagee, things coming to his knowledge after and during his retainer by either party, though prior to his retainer by the other, were formerly held to be notice to both parties. (*Fuller* v. *Bennett*, 2 Ha. 394.) The present section modifies the law in this respect. (See *Re Cousins*, 31 C. D. 671, at pp. 676, 677.)

Notice to the solicitor is ordinarily notice to the client, although the information is not in fact communicated to the latter; but this rule does not extend to matters as to which there is an antecedent presumption that they would not be communicated by the solicitor, as for example, the solicitor's own fraud. (See *Ex parte Oriental Commercial Bank*, L. R. 5 Ch. 358; *Waldy* v. *Gray*, L. R. 20 Eq. 238.) And of course, no notice will be presumed when the circumstances are not such as to impose on the solicitor any duty to make the communication. (*Kettlewell* v. *Watson*, 21 Ch. D. 685; reversed on appeal, 26 Ch. D. 501, on the facts only, not upon any question of law.) But if the fraud is of such a nature, that it would have been discovered by an independent solicitor employed by the client, then the mere fact that the solicitor was cognizant of the fraud, as being himself the author of it, will not prevent the client from being fixed with constructive notice. (*Kennedy* v. *Green*, 3 My. & K. 693, see p. 720.)

In *Saffron Walden Building Society* v. *Rayner*, 14 Ch. D. 406, the Court of Appeal strongly discountenanced the view, that there is such a thing as a permanent office of solicitor, or that a solicitor, who happens to be in the habit of acting for a person,

C. A. 1882, Sect. 3.

is his agent so as to bind him by receiving notices or information. (See also *Tate* v. *Hyslop*, 15 Q. B. D. 368, at p. 374.) No doubt a solicitor can be actually invested with such authority; but this must be expressly done. Therefore notice of a *puisne* incumbrance to a solicitor who usually acts for a first mortgagee, will not of itself prevent such first mortgagee from tacking subsequent advances.

By the S. L. Act, 1882, s. 45, p. 267, *post*, (modified by the S. L. Act, 1884, s. 5,) it is provided, that a tenant for life exercising the statutory powers shall give notice to the trustees, and also to "the solicitor to the trustees," if any such solicitor is known to him; but this seems to be only a measure of general precaution, and not to constitute such a solicitor the trustee's agent for the purpose of receiving notice.

See, further, as to notice to solicitors, &c., *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. D. 160; *Cave* v. *Cave*, 15 Ch. D. 639; Coote on Mortgages, 4th ed. p. 783; 5th ed. p. 852; Fisher on Mortgages, 3rd ed. par. 910 *et seq.*; 4th ed. par. 865 *et seq.* See, also, *Arden* v. *Arden*, 29 Ch. D. 702, at p. 709.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

This sub-section appears to contemplate the cases represented by *Tulk* v. *Moxhay*, 2 Ph. 774; including restrictive covenants in superior leases. Only negative covenants are within the principle of that case. (*Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403; *L. and S. W. Railway Co.* v. *Gomm*, 20 Ch. D. 562, see p. 583.) But in *Andrew* v. *Aitken*, 22 Ch. D. 218, Fry, J., seems to have thought that, though the assignee of the lands could not be compelled to perform an affirmative covenant, he might be obliged to permit it to be performed by the persons liable to perform it. This, however, seems to be an absolutely novel suggestion. It is difficult to imagine in what terms the original covenantor could formulate such a claim; and there seems, at all events, to be no equity to prevent the owner of the land, supposing the covenant (in this case, to build a house) to have been performed, from proceeding forthwith to undo what had been done.

As to the circumstances under which restrictive covenants can be enforced by other persons who have entered into similar covenants, see *Nottingham, &c., Brick Co.* v. *Butler*, 15 Q. B. D. 261, at p. 268, affirmed 16 Q. B. D. 678; and *Collins* v. *Castle*, 36 Ch. D. 243.

Restrictive covenants cease to be enforceable, when they cease

C. A. 1882, Sect. 3.

to be appropriate to the circumstances; as, for example, by a change in the character of a building estate caused or permitted by the covenantee (see *Sayers* v. *Collyer*, 24 Ch. D. 180; 28 Ch. D. 103); or by acquiescence in breaches of similar covenants committed by other covenantors (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34). A delay (say) of fourteen months in taking proceedings to prevent the continuance of a breach of a restrictive covenant will not of itself disentitle a covenantee to an injunction. (*Duke of Northumberland* v. *Bowman*, 56 L. T. 773.)

Notice of a restrictive covenant may be constructive notice. (*Wilson* v. *Hart*, L. R. 1 Ch. 463.)

Though "purchaser" includes an "intending purchaser," the sub-section will not of course affect the ordinary right to determine a contract which does not disclose unusual restrictions in the title.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

Registration is not constructive notice to a purchaser who has omitted to search a registry; and, in the absence of express notice, it gives no priority over a subsequent registered deed which conveys the legal estate (*Morecock* v. *Dickins*, Ambl. 678); nor, in such absence, does it prevent a prior mortgagee from tacking a subsequent charge which has been duly registered. (*Bedford* v. *Backhouse*, 2 Eq. Ca. Ab. 615.) But, coupled with notice, it prevents the tacking of a prior further charge which has not been registered. (*Credland* v. *Potter*, L. R. 10 Ch. 8.)

A mortgagee or purchaser need not search; but, if he searches, notice will be presumed (*Procter* v. *Cooper*, 2 Drew. 1); but only from the date at which his search commenced. (*Hodgson* v. *Dean*, 2 Sim. & St. 221.)

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.

Leases.

Sect. 4. Contract for lease not part of title to lease.

4.—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

C. A. 1882, Sect. 4.

(2.) This section applies to leases made either before or after the commencement of this Act.

It will be observed that the section refers only to a lease made *under a power*, while the marginal note uses simply the word lease. The explanatory notice prefixed to the Bill stated that "the object of clause 5 is to relieve the title to leasehold land, especially on a building lease, from the preliminary contract to a lease." Clause 5 of the Bill is represented by s. 4 of the Act. The latter introduces the words "for the purpose of the deduction of title to an intended assign": the former refers generally to the title "of any person."

If a lease, whether made under a power or not, is made in violation of a contract, whether by a fraud or by a mutual mistake, the parties have the same rights, as regards rectification and specific performance, as they would have in the case of any other violated contract. But these rights would not affect an assign of the lease taking without notice of the violation. It is not the general practice to treat contracts for leases as part of the title, nor is an intended assign under any obligation to inquire into the existence of any preliminary contract. But if left at liberty to require the production of any such contract, the purchaser might thereby indirectly obtain notice of defects in the vendor's or his lessor's title, upon which he might be entitled to insist, although precluded by law from making any direct investigation into that title.

It is probable that the present section may take effect to prevent the purchaser, on the sale of a lease which has been granted by a tenant for life under the powers conferred by the S. L. Act, 1882, from being entitled to call for the preliminary contract for the lease, in order to satisfy himself that the power was rightly exercised. If this was the true intent of the section, the enactment of s. 31, sub-s. (4), of the S. L. Act, 1882, p. 248, *post*, seems to be superfluous.

Separate Trustees.

Sect. 5. Appointment of separate sets of trustees.

5.—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

(2.) This section applies to trusts created either before or after the commencement of this Act.

This section confers a power, which has been frequently exercised by the Court, to appoint separate trustees of separate shares of trust property. See *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Grange, Cooper* v. *Todd*, W. N. 1881, p. 50; *Re Dennis'*

Trusts, 12 W. R. 575; *Re Cunard's Trusts*, 27 W. R. 52; *Re Moss's Trusts*, 37 Ch. D. 513.

The language, "held on trusts distinct," &c., suggests that it will be sufficient if, at the time of the appointment, the trusts are distinct, although that part of the property may originally have been held upon trusts partly identical with those on which some other part is or was held.

It would appear from the words, "on an appointment of new trustees," that an appointment of separate trustees of a separate part cannot be made under this section for the mere purpose of abstracting that part from the custody of existing trustees who are allowed to remain in custody of the residue. Whether after a total extinction of trustees, new trustees could be appointed of a part without also appointing new trustees of the residue, seems to be doubtful; and it has been held by Porter, M. R., in an Irish case, that no appointment can be made under this section, except upon the occasion of an appointment of new trustees for the entire trust property. (*Re Nesbitt's Trusts*, 19 L. R. Ir. 509.) The Court of Appeal, in affirming this decision, did not decide the question of jurisdiction. Nor is it clear that, if a new appointment should be made when there are continuing trustees, the latter could retire from, or be deprived of, their trust as to a part of the property. If such a course might be pursued, the result would follow, that whenever a settlement contained distinct sets of trusts, the continuing trustees might be removed upon pretence of appointing separate sets of trustees, although such continuing trustees might not otherwise be legally removeable without their own consent. If such an appointment is desirable, an application must be made to the Court, under the jurisdiction given by s. 32 of the Trustee Act, 1850 (see *Re Moss's Trusts*, *supra*); and not under this section (see *Savile* v. *Couper*, 36 Ch. D. 520). There is no reason to doubt that the parties themselves, without the aid of the Court, might, under this section, have done what was done by the Court in *Re Paine's Trusts*, 28 Ch. D. 725; where the existing or continuing trustee was joined with the newly-appointed separate trustees. It is no obstacle to the exercise of the power given by this section, that the separate trusts may, under certain contingencies, coalesce. (*Re Hetherington's Trusts*, 34 Ch. D. 211.)

It may be doubted whether the power given by this section can be exercised, unless the separate trust properties are already severed, or are immediately severable.

The persons to exercise the power given by this section seem to be the persons nominated by s. 31 of the Conv. Act, 1881, p. 91, *ante*.

The section does not expressly provide for vacancies occurring in a separate body of new trustees so appointed, or for cases where different sets of trustees have been appointed by the instrument creating the trust. In both cases it is conceived that the ordinary rule of appointment by the survivor, &c., will apply; but this may be open to doubt (see Lewin on Trusts, chap. 24, pt. 1, sect. 3), especially in the former case, and the section might with advantage have been made more explicit.

C. A. 1882, Sect. 6.

Powers.

Disclaimer of power by trustees.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

The provisions respecting powers, contained in this and the foregoing Act, are summarized in the note on s. 52 of the Conv. Act, 1881, p. 129, *ante*.

The term "disclaimer" is more usual than "release," in relation to powers which are not given to a person to be used at his own will and pleasure. It has substantially the same effect, and this section will not enable a tenant for life to disclaim his statutory powers under the S. L. Act, 1882. See s. 50, sub-s. (1), of that Act, p. 274, *post*.

If all the trustees should disclaim their powers, these would, of course, be exerciseable by any subsequently appointed trustees.

The object of this section seems to be to enable that to be done by a part of the trustees, which previously could have been done only by the whole body. In cases where, by reason of the reposal of a personal discretion in the whole body, a disclaimer by any one or more would practically amount to a release and extinction, it is submitted that this section does not apply, even though the instrument containing the power should not contain any express declaration to that effect. (See *Re Eyre, Eyre* v. *Eyre*, W. N. 1883, p. 153; 49 L. T. 259; and Conv. Act, 1881, s. 52, note, p. 130, *ante*.) It does not seem to be the intention of the present section, to enable a personal discretion to be exercised except by the whole body of the donees.

Where the power is coupled with an interest, the deed of disclaimer should not purport to convey the interest, but only to disclaim the power. (See *Urch* v. *Walker*, 3 My. & Cr. 702; *Crewe* v. *Dicken*, 4 Ves. 97; *Nicloson* v. *Wordsworth*, 2 Swanst. 365; which cases are somewhat at variance.) It seems clear that the power cannot be disclaimed without also disclaiming any legal estate to which the power, if accepted, would be annexed.

There seems to be no reason why a married woman should not, under this section, disclaim a power not coupled with any interest without the concurrence of her husband. If the power is coupled with an interest, then—(1) If she is a trustee, it

C. A. 1882, Sect. 6.

seems to be the safer opinion that her husband's concurrence is still necessary, except in cases coming within the V. & P. Act, 1874, s. 6, and cases relating to such personal property as is specified in the Married Women's Property Act, 1882, s. 18, p. 346, *post;* (2) if her power is not purely ministerial or official, the husband's concurrence will be necessary, unless the woman was married, or the interest was created, subsequently to the commencement of the last-mentioned Act.

The introduction into the marginal note of the words "by trustees," which nowhere appear in the body of the section, suggests a suspicion that sub-s. (2) of this section was only designed to supply a defect in the Conv. Act, 1881, s. 38 (see note thereon, p. 104, *ante*), which provides for the survivorship of a joint power in *executors* or *trustees* on a death, but does not provide for the continuance of the power on a disclaimer, although s. 52 of that Act seems to have made such a disclaimer possible.

There existed at one time some difference in opinion as to the authority of marginal notes in an Act of Parliament. In *Venour* v. *Sellon*, 2 Ch. D. 522, Jessel, M. R., said that marginal notes form part of the Act. This doctrine was subsequently disapproved by the Court of Appeal in *Att.-Gen.* v. *Great Eastern Railway*, 11 Ch. D. 449, see pp. 461, 465; and in *Claydon* v. *Green*, L. R. 3 C. P. 511, the Court of Common Pleas sitting in *banc* had previously expressed the opinion that marginal notes form no part of the statute, and are not binding as an explanation.

In *Sutton* v. *Sutton*, 22 Ch. D. 511, at p. 513, Jessel, M. R., withdrew his *dictum* in *Venour* v. *Sellon*, and it may probably now be considered settled, that the marginal notes have no authority. This accords with the opinion of the Statute Law Committee. In the Revised Edition of the Statutes, the marginal notes have been freely revised throughout by the Editors. See also *Osborne* v. *Milman*, 18 Q. B. D. 471, at p. 477.

Married Women.

Sect. 7. Acknowledgment of deeds by married women.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having

C. A. 1882, Sect. 7.

reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

As to deeds executed after 31st December, 1882, no certificate of acknowledgment will be required to be made or filed; see schedule, and note (*a*), p. 182, *post;* and the deed will take effect immediately on acknowledgment.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.
40 & 41 Vict. c. 57.

This, so far as it relates to England, is a re-enactment, with such formal alterations in the list of specified officials, and otherwise, as later legislation has made appropriate, of 17 & 18 Vict.

c. 75, sects. 1 and 3, which are now repealed; see schedule, p. 182, *post*. C. A. 1882, Sect. 7.

(4.) The enactments described in the Schedule to this Act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

By the Married Women's Property Act, 1882, the marital right and its incidents *inter vivos* are, with regard to women married after its commencement, practically abolished, and, in the case of women already married, are abolished in respect to property taken by a subsequently accruing title; so that property to which the marital right of husbands is applicable will tend continually to decrease, and all property belonging or coming to a married woman will, after a time, necessarily be

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held or taken by her for her separate use. Since a married woman can dispose of her separate estate, so far as the separate use extends, by deed without acknowledgment (*Pride* v. *Bubb*, L. R. 7 Ch. 64, which seems to overrule *Lechmere* v. *Brotheridge*, 32 Beav. 353), it seems to follow that the practice of acknowledging deeds will tend to become obsolete. As to property not coming within the Vendor and Purchaser Act, 1874, s. 6, and as to such personal property as is specified in the Married Women's Property Act, 1882, s. 18, which is held by her as a trustee, or *en autre droit*, see note at p. 316, *post*.

Powers of Attorney.

Sect. 8. Effect of power of attorney, for value, made absolutely irrevocable.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

See note on the next following section.

Sect. 9. Effect of power of attorney, for value or not, made irre-

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one

C. A. 1882, Sect. 9.

year from the date of the instrument, then, in favour of a purchaser,—

vocable for fixed time.

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

This and the preceding section must be read in connection with sects. 46 and 47 of the Conv. Act, 1881, pp. 121, 123, *ante*. See notes thereon.

These sections will facilitate dealings with persons acting under powers of attorney executed after December 31st, 1882, and which are *expressed to be* irrevocable either for an indefinite period, if the power be given for value, or for a period not exceeding a year in other cases. The old forms used by conveyancers often purported to make irrevocable appointments, but such appointments were nevertheless revocable at will, and were *ipso facto* revoked by death. But the Courts of Equity were accustomed to "give effect to all *bonâ fide* dealings with the attorney which took place after the death of the principal and before the death became known to the attorney; especially where valuable consideration passed." (1 Dav. Prec. 4th ed. 475; 5th ed. 387.) Nor would equity permit the principal to revoke a power given for valuable consideration. (*Bromley* v. *Holland*, 7 Ves. 3, at p. 28; *Metcalfe* v. *Clough*, 2 Man. & Ry. 178.)

Cases might arise in which the operation of these sections may be doubtful or anomalous; for example, if a tenant in tail having

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given an irrevocable power of attorney to execute a disentailing deed, should die before the execution; or if a settlor, having given an irrevocable power of attorney to execute a settlement, or to execute a deed revoking the uses of an existing settlement and limiting new uses, should in like manner die. If the donor of an irrevocable power to sell lands should afterwards sell the lands to a purchaser for value without notice of the power of attorney, and the attorney should afterwards sell the lands to a purchaser for value without notice of the previous sale, a difficult conflict of rights and equities would arise. In some cases, as on the sale of an undivided share, the non-delivery of the title deeds by the vendor would be naturally accounted for, and would raise no presumption of fraud. In such cases a purchaser from an attorney under an irrevocable power should, notwithstanding the provisions of sects. 8 and 9 of the present Act, take steps to assure himself that there have been no intermediate dealings with the property by the donor of the power.

Other questions are likely to arise; for example, if a person, having given an irrevocable power of sale, should die having specifically devised the property, it might be a question whether a subsequent exercise of the power would take effect as an ademption of the specific devise. So, also, on an intestacy, it might be a question whether, on a subsequent sale, the purchase-money would go as realty or as personalty. It is suggested that in such cases a subsequent sale should not effect any unnecessary alteration in the rights of parties, and that, if a sale should be made, the purchase-money should go to the person who would otherwise have taken the land; and also that before a sale had been made, the specific devisee, or heir-at-law, might, under the ordinary jurisdiction of the Court, obtain an injunction to restrain the donee from exercising the power, if the power were ministerial only, and not necessary for securing the rights of other persons.

The dangerous influence which these irrevocable powers may exercise upon titles suggests the conclusion, that the public registration of such powers ought to be made compulsory by legislation.

It will be observed that, under the present section, the year during which the power of attorney may be made irrevocable is computed from the *date* of the instrument. The language of this enactment is closely parallel to that of the Statute of Inrolments (27 Hen. 8, c. 16)—"within six months next after the *date* of the same writings indented;" where, according to Preston, the word "date" means the day of the date of the deed, not of the delivery. (1 Prest. Abst. 288.) But according to an *obiter dictum* of Lord Eldon, in *Underhill* v. *Horwood*, 10 Ves. 209, at p. 228, the day of the date is the day of the execution. After inrolment the bargain and sale relates back to and takes effect from the execution. (*Robinson* v. *Comyns*, Cas. temp. Talb. 164.)

Executory Limitations.

Sect. 10. Restriction

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years

C. A. 1882, Sect. 10.

on executory limitations.

absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

It is not clear that this section applies to an executory limitation in defeasance of an equitable fee simple, or, in general, to executory limitations of trusts as distinguished from uses. The definition of "land" in the Conv. Act, 1881, s. 2, sub-s. (ii.), p. 2, *ante*, would include equitable fees simple; but that definition is not incorporated into the present Act; and the phraseology of the present section suggests, that it was composed without any reference to that definition.

A tenant in fee simple, subject to an executory limitation, could not defeat that limitation by a common recovery (*Pells* v. *Brown*, Cro. Jac. 590); though a tenant in tail could thereby defeat an executory limitation upon his estate tail.

Such a limitation might have been barred by non-claim on a fine levied with proclamations; but the period of non-claim began to run, not from the levying of the fine, but from the vesting of the executory interest. The same rule applies both to executory devises and to springing and shifting uses. "It is frequently said, that an executory devise cannot be barred by a common recovery. The truth is, that a tenant in fee, subject to an executory devise, cannot by recovery, or by any other means, except by a fine or [*read*, and] non-claim on a fine, defeat an executory devise to which the estate is subject." (3 Prest. Abstr. 139.) "A springing or shifting use cannot be barred by a fine, levied of the estate out of which such springing or shifting use is to arise, unless there be a non-claim of five years after it arises." (Cruise, 1 Fines & Rec. 3rd ed. p. 313.) The practical effect of the fine was only to shorten the period of limitation to five years.

The present section destroys the executory limitation at the time when the son or other issue of the person entitled, if he had been tenant in tail, might, with the consent of the person entitled, if the latter had been tenant for life preceding the estate tail, have acquired a fee simple in remainder; whereas, previously, the executory limitation could not have been defeated at any time during the life of the person entitled subject thereto.

The section does not deal with executory limitations in defeas-

C. A. 1882, Sect. 10.

ance of estates tail; probably because they are defeated by the barring of the entail.

Executory limitations of terms of years are only possible by way of devise (see note on the Conv. Act, 1881, s. 65, sub-s. 2, p. 145, *ante*), and they do not often occur in practice. It is improbable that executory limitations in defeasance of an estate "for term of life," in the sense of an estate for the life of the tenant, are ever found; but an estate *pur autre vie*, already *in esse*, as a leasehold estate for lives, is sometimes devised subject to an executory limitation to take effect on default of issue. (See *Re Barber's Settled Estates*, 18 Ch. D. 624.)

An executory limitation, to take effect upon a failure of issue generally, which seems to be indicated by the language, "whether within or at any specified period or time *or not*," would, independently of this section, be absolutely void, by reason of the rule against perpetuities. The words above cited seem to be merely superfluous.

A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event, has the powers of a tenant for life under the S. L. Act, 1882. (See s. 58, sub-s. ii. of that Act, p. 287, *post*.)

Long Terms.

Sect. 11. Amendment of enactment respecting long terms.

11. Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See Conv. Act, 1881, s. 65, p. 142, *ante*, and notes thereon.

Mortgages.

Sect. 12. Reconveyance on mortgage.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer

shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer. C. A. 1882, Sect. 12.

Since, in the Conv. Act, 1881, the word "mortgagor" is made to include any person entitled to redeem, it clearly includes a *puisne* incumbrancer, and this view was taken in *Teevan* v. *Smith*, 20 Ch. D. 724. Hence, there might be an unlimited number of persons, all of whom would equally be entitled to exercise the right conferred by s. 15 of that Act. The object of the latter part of the present section is to remove all doubt as to whether the existence of *mesne* incumbrancers disables a *puisne* mortgagee from requiring a transfer of a prior mortgage, and also to prevent a prior incumbrancer from being ousted of his right by the fact of a demand for transfer having been first made by a subsequent incumbrancer. The section makes no provision as to the point of time at which interference by the prior incumbrancer will come too late, and, as expense might be fruitlessly incurred, it will be desirable, when a *puisne* incumbrancer proposes to exercise the right, for him to give notice to all incumbrancers intervening between himself and the person on whom he proposes to make the demand.

This last remark, however, does not apply to cases in which a third mortgagee, who has taken his charge without notice of the existence of the second mortgage, wishes to protect himself, under the doctrine of tacking, by getting in the legal estate. The present enactment will to a certain extent lessen the mischief of that doctrine by depriving the first mortgagee, who has the legal estate, of his power to prefer either of the subsequent mortgagees to the other. As soon as the second mortgagee has learned that a third mortgage exists, he will be able to require that the first mortgage shall be transferred to himself. The protection given by the legal estate is effectual, even though the legal estate has been acquired *pendente lite;* but not if it has been acquired after decree. (*Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Ex parte Knott*, 11 Ves. 609, at p. 619.)

Saving.

13. The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may Sect. 13. Restriction on repeals in this Act.

C. A. 1882, Sect. 13. be carried on and completed as if there had been no such repeal in this Act.

See note on the Conv. Act, 1881, sect. 71, *ante*.

Schedule. Section 7 (4).

SCHEDULE.

Repeals.

3 & 4 Will. 4, c. 74. in part.	The Fines and Recoveries Act	in part; namely,— Section eighty-four, from and including the words "and the same judge," to the end of that section (*a*). Sections eighty-five to eighty-eight inclusive (*a*).
4 & 5 Will. 4, c. 92. in part.	The Fines and Recoveries (Ireland) Act ..	in part; namely,— Section seventy-five, from and including the words "and the same judge," to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75.	An Act to remove doubts concerning the due acknowledgments (*b*) of deeds by married women in certain cases (*c*).	
41 & 42 Vict. c. 23.	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.	

(*a*) These sections relate to the making and filing of certificates of acknowledgments.

(*b*) In the title of the original Act, the word is "acknowledgment."

(*c*) The provisions of this Act are re-enacted, with variations, in s. 7, p. 173, *ante*.

THE SETTLED LAND ACT, 1882.

(45 & 46 Vict. c. 38.)

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.

[10th August, 1882.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—Preliminary.

Sect. 1.

Short title; commencement; extent.

1.—(1.) This Act may be cited as the Settled Land Act, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

There occurs no passage in the Act where "it is otherwise expressed," unless s. 46, sub-s. (9), p. 270, *post*, and s. 65, sub-s. (8), p. 300, *post*, be considered such. The Act affects settlements in existence at the time of its commencement, but has not otherwise any retrospective operation. The coming into operation of the Act did not, it is conceived, validate anything done before its commencement, which, although it would have been valid if done afterwards, was not valid at the time at which it was done. But the Act of 1887, s. 1, p. 310, *post*, permits capital money to be applied in payment of rent-charges, created

S.L.A. 1882, Sect. 1.

before its enactment, for the purpose of effecting improvements which are of a kind authorized by the present Act.

(3.) This Act does not extend to Scotland.

II.—Definitions.

Sect. 2. Definition of settlement, tenant for life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

Since different lands may by the same instrument be limited in different lines of succession, it seems that several settlements may be created by the same instrument. See note on s. 5, p. 198, *post*.

It is conceived that this sub-section will be construed to include settlements made by feoffment, though its language is not well adapted to the purpose. By the 8 & 9 Vict. c. 106, s. 3, a feoffment, other than a feoffment made under a custom by an infant, is void unless *evidenced* by deed; and by the Statute of Frauds (29 Car. 2, c. 3), s. 1, no feoffment can convey any greater estate than a tenancy at will, unless it is "put in writing," signed by the feoffor or his agent thereunto lawfully authorized in writing. The deed by which the feoffment is evidenced, or, in the case of a feoffment made under a custom by an infant, the writing into which the feoffment is "put," will probably be held to be "instruments" within this sub-section, although they only remove a statutory impediment to the operation of the feoffment.

On feoffments made by infants of lands subject to the custom of gavelkind, see Robinson on Gavelkind, Bk. ii., ch. 3; Challis R. P. 325. Uses may be declared upon the seisin transferred by such a feoffment, and therefore a settlement might be effected thereby.

The language of this sub-section, taken in connection with that of sub-s. (3), *infra*, would naturally suggest, that a settlement is so only in relation to the land settled by it, and not in relation to other property which happens to be comprised in the same document. See, however, s. 33, p. 185, *post*.

A summons in relation to a settlement, part of the property

comprised in which has been made the subject of a sub-settlement, should be entitled only in the matter of the original settlement, and served only on the trustees of that settlement. (*Re Knowles' Settled Estates*, 27 Ch. D. 707.) S.L.A. 1882, Sect. 2.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

For some remarks upon the distinctions between remainders and reversions, see Challis, R. P. 59. This sub-section does not appear to refer to remainders or reversions existing previously to and independently of the settlement, but only to remainders and reversions separated off from the particular estate by the settlement itself. In practice, the sub-section will refer only to reversions, which are often confused with remainders.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

On the meaning of "land," see sub-s. (10), (i.), *infra*. The present sub-section does not define "land," but "settled land."

The powers conferred by the Act, so far as regards their exercise by a person who is in fact a tenant for life under a settlement, bind only such estate or interest as is comprised in the settlement. For example, the tenant for life of a term of years cannot grant a lease for a longer term than the residue of the settled term. But it must be remembered that in some cases the word "settlement" bears in this Act an artificial meaning. The undisposed-of reversion on a tenancy for life created by a will, is deemed to be included in the will so far as it is regarded as a settlement, see sub-s. (2), *supra;* and such reversion would be bound by any exercise of the powers by the tenant for life. A similar remark applies to most of the limited owners who, by s. 58, p. 284, *post*, have the powers of a tenant for life. Nevertheless, the proposition is generally true, that no estate or interest will be bound, which could not have been bound by the settlor. This language does not, however, adequately apply to the case of a tenant by the curtesy; see S. L. A. 1884, s. 8, p. 308, *post*, and note thereon.

On settlements of terms of years, see note to s. 65, sub-s. (5), of the Conv. Act, 1881, p. 147, *ante*. As to the exercise of powers by the tenant for life of a settled term created by a lease containing a covenant not to assign or sublet without licence, see note to s. 6, p. 198, *post*.

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(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

This provision was originally enacted by 27 & 28 Vict. c. 45, s. 3, in consequence of the decisions in *Re Goodwin's Settled Estates*, 3 Giff. 620, and *Re Birtle's Settled Estates*, 11 W. R. 739. But it seems to have no particular function in the present Act, because the question which it determines could be of importance only with reference to lands which under a settlement have come to be held in undivided shares, which case is specifically provided for by s. 19, *post*.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

This includes both a legal and an equitable tenant for life in possession; see sub-s. (10), (i.), *infra*. As to the other persons upon whom are conferred the powers of a tenant for life under the Act, see sects. 58, 60, 61, 62, *post*.

As to the exercise of his statutory powers by a tenant for life who has incumbered his estate or interest under the settlement, see sub-s. (7), *infra*, and s. 50, p. 274, *post*.

A trust to sell the life estate, coupled with a covenant on the part of the tenant for life not to retain the estate for life *in specie*, will not deprive the tenant for life of his statutory powers. (*Re Hale and Clark*, W. N. 1886, p. 65; 34 W. R. 624.) That case seems to have been decided upon the ground that, after a sale, if the tenant for life should be the purchaser, he would still possess the statutory powers; but it may be doubted whether that circumstance is at all material. It would seem that, under s. 50, p. 274, *post*, the tenant for life would retain his statutory powers after such a sale, though not himself the purchaser.

No power "exerciseable for any purpose provided for in this Act" can now be conferred by a settlement upon trustees, so as to be exercised by them without the consent of the tenant for life. See s. 56, sub-s. 2, p. 282, *post*. There can never be more than a single tenant for life, within the meaning of the Act, at the same time; though such a tenant for life may consist of several individual persons acting jointly. See sub-s. 6, *post*. If the tenant for life consists of more than one person, the consent of one of them will suffice; see S. L. A. 1884, s. 6, sub-s. (2), p. 305, *post*. If the tenant for life is an infant, it seems that such consent is to be given in his behalf by the trustees for purposes of the Act, who may be, but are not necessarily, the same as the trustees to exercise the power. (*Re Duke of Newcastle's Estates*, 24 Ch. D. 129.) The same principle seems applicable to the giving of consents on behalf of lunatics.

If a person entitled to a rentcharge, or other incumbrance, prior to the settlement, should take possession of the land, this seems to be no interference with the powers of the tenant for life, because the phrase "settled land" includes only what is included in the settlement, and this is subject to and apart from the prior incumbrance. But of course the powers could be exercised only upon or over the "settled land," *i. e.*, the land subject to the prior incumbrance; and see s. 20, sub-s. (2), (i.), p. 219, *post*.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

The Act contains nothing to enable a majority, either of number or in value, of such joint tenants or tenants in common, to bind a dissentient minority.

Although several tenants in common for life constitute, by virtue of this sub-section, only one tenant for life, yet it seems that, by virtue of s. 19, p. 217, *post*, they may act separately, so far as regards concurring with owners of other undivided shares not comprised in the settlement, or concurring with some only of the other tenants in common. See also s. 3, sub-s. (iv.), p. 195, *post*.

The several persons who are the objects of a discretionary trust for distribution of rents and profits during the life of one of them, do not together constitute a tenant for life under the Act. (*Re Atkinson, Atkinson* v. *Bruce*, 31 Ch. D. 577.) In such a case it can hardly be said that the several persons have concurrent estates or interests.

A settlor might make the exercise of the statutory powers difficult, by making the tenant for life to consist of a considerable number of joint tenants, all but one taking very small interests under the settlement. It is conceived that this could not be treated as an evasion of the Act; for such an arrangement would in nowise deprive the complex tenant for life of the statutory powers, and the construction of such complex tenants for life is expressly sanctioned by the Act.

Such joint tenants could not obtain a partition of anything except their joint life estate. But application might be made to the Court to exercise the powers given by the Settled Estates Act, 1877. Sect. 28 of that Act enables the Court to dispense with consents.

An undivided share of land separately comprised in a settlement is settled land for purposes of the Act. See sub-s. (10) (i.), *infra*.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or other-

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wise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

See s. 50, p. 274, *post*, and s. 58, sub-s. (ix.), p. 289, *post*.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

As to the necessity, when no trustees for the purposes of the Act exist, for procuring the appointment of such trustees, see note on s. 45, p. 267, *post*. As to the appointment of trustees, see s. 38, p. 259, *post*, and, where the tenant for life is an infant, s. 60, p. 291, *post*.

There seems to be no reason why trustees for the purposes of the Act might not have been nominated by a settlement executed between the passing and the commencement of the Act.

A trustee having a power of sale to arise *in futuro*, is not a trustee for purposes of the Act. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.)

It is conceived that trustees having an immediate power of sale exerciseable only with the consent of the tenant for life, would be trustees for purposes of the Act.

It seems clear that trustees having a power of sale will be trustees for purposes of the Act only in relation to the settled land to which their power of sale relates, and not in relation to any other land which may also be settled by the same instrument. And as it does appear to be necessary that the power of sale, or of consenting, should extend to the whole of the lands comprised in the settlement, it would seem that trustees with a power of selling all the lands other than the principal mansion-house, would be trustees for purposes of the Act with respect to the other lands. But such trustees would not appear to be trustees for the purposes of s. 15, p. 211, *post*. And for the purpose of receiving sale moneys arising from a sale of "heirlooms," under s. 37, p. 256, *post*, it would seem that the trustees must have a power of sale of the lands with which the chattels are to devolve.

A trustee with a power of sale subject to the consent of the tenant for life is a trustee for purposes of the Act. (*Constable* v. *Constable*, 32 Ch. D. 233.) It has been held that if the consent of some other person which cannot be obtained is necessary, a fresh appointment of trustees must be made. (*Re Johnstone's Settlement*, 17 L. R. Ir. 172.) It is a question whether, if the

consent of any person other than the tenant for life is necessary, this will not prevent the trustees from being trustees for purposes of the Act, especially as it does not appear how the consent of the person is to be signified, seeing that the consent of the trustees themselves is not necessary.

Trustees for purposes of the Act, when distinct from the trustees of the settlement, will be an anomalous body, constituted by and deriving their powers from the Act alone; and it is conceived that they are not within the meaning of the Conveyancing Act, 1881, s. 31, *ante*. See s. 38, p. 259, *post*, and note thereon.

When realty is settled by reference to trusts of personalty, trustees in whom the latter is vested, if they have a power to call in and vary investments, are trustees of the realty for purposes of this Act. (*Re Garnett Orme's Contract*, 25 Ch. D. 595.)

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

The phrase which this sub-section affects to define would have been equally intelligible without it.

In some cases, methods by which capital money may arise are specifically mentioned, see s. 11; s. 18; s. 22, sub-s. (7); s. 31, sub-s. (ii.); s. 32; s. 33; s. 34; s. 35, sub-s. (2); and s. 37, *post*.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

The phrase "settled land," which in this Act, by virtue of sub-s. (3), *supra*, includes *any estate or interest* in land, of course includes a term of years. It seems not to be material for the purposes of this Act to inquire whether "land" by itself would include a term of years. See the Conv. Act, 1881, s. 2, sub-s. (ii.), p. 2, *ante*, and note thereon.

Easements are not incorporeal hereditaments, but rights appurtenant to corporeal hereditaments. Rights created by statute and in their nature (that is, so far as regards the privileges which they confer) resembling easements, may sometimes exist apart from any corporeal tenement to which they are appurtenant; and such rights have sometimes been loosely styled easements. See, for an example, *Great Western Railway* v. *Swindon, &c. Railway*, 22 Ch. D. 677, at p. 707.

It has been held in *Re Collinge's Settled Estates*, 36 Ch. D. 516, that the tenant for life of an undivided moiety of certain lands could not exercise the statutory power of sale, except with the concurrence of the owner of the other moiety. It is conceived that this decision cannot be defended. The attention of the

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learned judge was not called to this sub-section, but only to sub-s. (6), *supra*, and s. 19, p. 217, *post*.

It has been held by Chitty, J., in *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136, that the phrase "incorporeal hereditaments" here includes a baronetcy. See, further, on this case, note on s. 37, p. 256, *post*.

According to Jessel, M. R., in *Taylor* v. *Taylor*, L. R. 20 Eq. 297; 1 Ch. D. 426, a person entitled to be paid the net income received by trustees, is not a person entitled to receipt of rents and profits within the meaning of the Settled Estates Act, 1856, s. 32. James, L. J., in *S. C.*, 3 Ch. D. 145, at p. 146, rather questioned this opinion, while affirming the decision of Jessel, M. R., upon another ground. Perhaps s. 58, sub-s. (ix.), p. 289, *post*, makes the mention of income, as distinguished from rents and profits, superfluous.

As to the rights of persons entitled to income, and generally their right to give directions to trustees as to the exercise of legal powers, see Lewin on Trusts, 8th ed., p. 234.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

The following kinds of rents or reservations are often found in mining leases:—

(1.) A fixed annual payment, being a rent commonly so called;

(2.) A surface rent, varying with the amount of surface land occupied for the purposes of the works;

(3.) A footage, or acreage, rent, varying both with the lateral extent and the thickness of the actual working;

(4.) Royalty, or galeage rent, varying with the amount of the minerals won; and

(5.) A wayleave rent, paid for the passage of minerals over other lands of the lessor; which is presumed to be what is here meant by the word "toll."

The word toll (*tolnetum*) was in common use in the time of Bracton (see lib. ii. cap. 24) to signify a tribute or custom paid for passage. The tolls referred to in this section, being payable in respect of passage over private lands, are tolls traverse.

In some mines there is also found,

(6) A spoil-bank rent, being a rent paid for land occupied by deposits of waste or rubbish.

It is also not uncommon to provide that royalties and other payments in respect of certain minerals may be made in kind; to which practice the provision in this section, "payment includes delivery," refers.

Several yearly rents may be reserved on one lease, and may be severally distrained for, and may severally be made the subject of a condition for re-entry. (See *Knight's Case*, 5 Rep. 54.)

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(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

The Settled Estates Act, 1877, s. 4, 1st sub-division, *post*, distinguishes between building leases and repairing leases, fixing different extreme limits for their respective terms.

(iv.) Mines and minerals mean mines and minerals whether already opened or in work, or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

The following substances are within the meaning of the term "minerals":—Arsenic; china, potter's, Dorsetshire, clay; also brick-clay (see *Earl of Jersey* v. *Neath Poor Law Guardians*, The Times, 7 March, 1889); coal; copper; coprolites; fire-clay; free-stone; gold; granite; gravel; iron; lead; limestone; marble; silver; salt; slate; stratum of stone; stone in quarry; tin; umber; zinc. As to the comprehensiveness of the term, see *Hext* v. *Gill*, L. R. 7 Ch. 699; *Att.-Gen.* v. *Welsh Granite Co.*, 1 Times Rep. 549. Flints are, perhaps, no longer minerals, when they have been turned up on agricultural land in the ordinary course of husbandry. (*Tucker* v. *Linger*, 8 App. Cas. 508.) And under particular circumstances the word may be restricted in meaning. (*Att.-Gen. for Isle of Man* v. *Mylchreest*, 4 App. Cas. 294; *Ld. Prov. of Glasgow* v. *Farie*, 13 App. Cas. 657.)

(v.) Manor includes lordship, and reputed manor or lordship:

See note on the Conv. Act, 1881, s. 2, sub-s. (iv.), p. 3, *ante*.

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

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(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

See note on the Conv. Act, 1881, s. 2, sub-s. (xii.), p. 6, *ante*.

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

See s. 48, p. 272, *post*.

(xi.) Person includes corporation.

III.—Sale; Enfranchisement; Exchange; Partition.

General Powers and Regulations.

Sect. 3.

Powers to tenant for life to sell, &c.

3. A tenant for life—

As to the duties and liabilities of a tenant for life, in exercising these and the other powers conferred by the Act, see s. 53, p. 279, *post*, and note thereon.

As to what costs will, under the Solicitors' Remuneration Act, 1881, Gen. Ord. r. 4, be allowed to the solicitor conducting the sale, see *Re Beck*, 24 Ch. D. 608.

A tenant for life may exercise his statutory powers without the sanction of the Court, although an order has been made for administration of the trusts of the settlement. (*Cardigan* v. *Curzon-Howe* (No. 1), 30 Ch. D. 531.)

(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

A sale by the remainderman of his interest, made before the passing of this Act, will not hinder the tenant for life from exercising this power of sale. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.)

As to cases in which an order for sale has been already made under the Settled Estates Act, 1877, see note on s. 56, p. 284, *post*.

Speculative expectations of a future increase in value of the estate afford no ground for restraining a sale on the application of the remainderman. (See *Thomas* v. *Williams*, 24 Ch. D. 558.)

As to estates, interests, and charges to which the powers conferred by the Act are subject, see sect. 20, sub-s. (2), *post*.

S.L.A.1882, Sect. 3.

As to the method by which easements may be created, see note on the Conv. Act, 1881, s. 62, p. 140, *ante*.

As to the principal mansion-house, &c., see s. 15, p. 211, *post*. As to a separate sale of the minerals, see s. 17, p. 215, *post*.

A tenant for life may, under a power of sale in the settlement, sell to a trustee for himself. (*Bevan* v. *Habgood*, 1 J. & H. 222.) It is doubtful whether he could under the Act.

Before the Act, when the trustees had a power of sale, the sale was in practice usually made by the tenant for life; and the contract was often executed by him alone, before any communication was made to the trustees. (See the remarks of Jessel, M. R., in *Forster* v. *Abraham*, L. R. 17 Eq. 351, at p. 355.)

Where a power of sale is given to trustees by a private Act of Parliament, the tenant for life may exercise his statutory power free from any restriction imposed on the power given to the trustees. (*Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.)

Although this sub-section authorizes the grant of an easement to be enjoyed over, or in respect to, the settled land as a servient tenement, it does not appear to authorize the extinction of an easement which the settled land enjoys as a dominant tenement over, or in respect to, other land. Such a transaction is not within the natural meaning of its language. It has been suggested by high authority (Wolstenholme & Turner, Settled Land Acts, 2nd ed. p. 16) that such extinction is rendered possible by the fact that, by virtue of 13 & 14 Vict. c. 21, s. 4, the word "land" includes "hereditament." Though the latter word does not there seem to include incorporeal hereditaments, see Dart V. & P. 6th ed. p. 160, *ibid.* p. 336, note (*t*), yet by s. 2, subs. (10) (i.), p. 189, *ante*, of the present Act, "land includes incorporeal hereditaments." But this fact only gives to the language of the present sub-section the meaning, "may sell the settled incorporeal hereditaments, or any part thereof;" and easements are not hereditaments, but are appurtenant to hereditaments. This language, therefore, does not seem to authorize the extinction of an easement appurtenant to the settled land, since the easement cannot be sold apart from the tenement to which it is appurtenant.

(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

The seignory of freehold land is not an estate, but a hereditament in which estates may subsist. It is not necessarily held

S.L.A.1882, Sect. 3.

for a fee simple; for manors having ancient freehold tenancies might, and often did, pass to the Crown by escheat or forfeiture, and might be, and often were, granted out for a fee tail, the reversion in fee simple remaining in the Crown. Some manors are probably so held at the present day, though lapse of time may have rendered the title obscure; and of them the seignory is held for a fee tail.

On a sale of the seignory of freeholds to the tenant, the seignory is extinguished, because "one man cannot of the same land be both lord and tenant." (Co. Litt. 152 b.) The object of extinguishing the seignory is the consequent destruction of the services, including chief rents, incident to the tenure.

As to the enfranchisement of copyholds by limited owners of manors independently of this Act, see (1) for voluntary enfranchisements, 4 & 5 Vict. c. 35; amended by 6 & 7 Vict. c. 23, and 7 & 8 Vict. c. 155; (2) for compulsory enfranchisement, 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94. (3) As to the application of compensation money in either case, see 4 & 5 Vict. c. 35, ss. 73—76.

(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

As to exchanges of settled land in England, see s. 4, sub-s. (8), *post*.

This does not authorize an exchange of one easement for another, *i. e.*, the extinction of an easement enjoyed by the settled land, in consideration of the grant of a new easement by a neighbouring owner. See note on sub-s. (i.), *supra*.

It may be doubted whether this sub-section authorizes an exchange of freeholds for leaseholds. No provision seems to have been made in such a case by the Act for apportionment of the rents of leaseholds acquired by exchange; and it is presumed that at all events the Court would not permit any exchange to be made of freeholds for leaseholds having a shorter term to run than that mentioned in s. 21, sub-s. (vii.), p. 227, *post; i. e.*, sixty years at least. But though, by virtue of s. 2, sub-s. (3), p. 185, *ante*, the phrase "settled land" doubtless includes settled leaseholds, it does not follow that unsettled land includes unsettled (or not yet settled) leaseholds. The meaning of "land," as applied to unsettled land, seems to depend upon the definition given in Lord Brougham's Act, 13 & 14 Vict. c. 21, s. 4, which does not include leaseholds.

It is therefore conceived that, though leaseholds may be exchanged for freeholds, yet freeholds cannot properly be exchanged for leaseholds. Nor can settled land be exchanged for easements over other land, these not being hereditaments. See s. 2, sub-s. (10) (i.), *ante*, and note thereon. By 12 & 13 Vict. c. 83, s. 7, it is specially provided that, in exchanges made under that Act, easements may be exchanged for land.

In common law exchanges, the estates which both parties have

S.L.A.1882, Sect. 3.

in the lands exchanged must be equal (Litt. sects. 64, 65), subject to certain exceptions, or apparent exceptions, not requiring particular mention. Common law exchanges should be avoided in practice, by reason of the mutual warranty implied therein. (Shep. T. 290.) It is somewhat doubtful whether an express stipulation negativing the warranty would be valid. Exchanges should, therefore, be effected by means of mutual conveyances. The statute 8 & 9 Vict. c. 106, s. 4, will prevent a right of re-entry from attaching on a common law exchange; but does not affect the mutual implied warranty. The corresponding (repealed) section of 7 & 8 Vict. c. 76, s. 6, abolished the warranty also. It may, perhaps, be a question, whether a right of re-entry is annexed to a warranty. (See Watk. Conv. 9th ed. p. 329, note.) On the inconvenience attending subsequent dealings with the property, after a common law exchange, see 1 Prest. Abst. 162.

(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

See note to s. 2, sub-s. (6), *ante*, which provision refers both to joint tenants and tenants in common. The present sub-section refers only to the latter. There seems here to be nothing inconsistent with that enactment, because in making partition all the tenants in common for life must apparently concur.

Sect. 19, *post*, seems to refer only to the exercise of the other powers conferred by the Act.

Sect. 4. Regulations respecting sale, enfranchisement, exchange, and partition.

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

In *Wheelwright* v. *Walker* (No. 2), W. N. 1883, p. 154, an injunction was obtained by a purchaser from a remainderman, who had sold his interest before the commencement of the Act, to restrain the tenant for life from subsequently selling at a less value than the purchaser was himself willing to give. It is conceived that every sale must be for a lump sum, and might not be, either wholly or partly, in consideration of a rent-charge; to which the regulations respecting capital moneys (s. 22, *post*) would not be applicable.

The Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72, s. 11, sub-s. (1), enacts as follows:—

11.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

(a) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working

S.L.A.1882, Sect. 4.

classes, may be made at such price, or for such consideration, or for such rent, as, having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

As to persons in a fiduciary position selling under needlessly depreciatory conditions, see notes to the Conv. Act, 1881, s. 3, sub-s. (11), p. 13, *ante*, and Trustee Act, 1888, s. 3, p. 315, *post*. As to the fiduciary position of the tenant for life, see s. 53, p. 279, *post*.

(6.) On a sale, exchange, or partition any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

It will probably be held that this sub-section was intended to enable the tenant for life to impose upon any part of the settled land remaining subject to the settlement, restrictions which will be binding upon remaindermen and reversioners to the same extent as if they had been imposed by an absolute owner, subject to the rights of incumbrancers, if any; as to which, see s. 20, sub-s. (2), p. 218, *post*.

As to restrictive covenants, see note on the Conv. Act, 1882, s. 3, sub-s. (2), p. 168, *ante*.

(7.) An enfranchisement may be made with or

without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be. S.L.A.1882, Sect. 4.

Enfranchisement extinguishes at law all rights of common in wastes, &c., of the manor, which before the enfranchisement were appurtenant to copyholds, because they appertain to the customary estate; and at law such extinguishment ensues, even though the enfranchisement purport to be made to the tenant "with all commons." (*Darson* v. *Hunter*, Noy, 136; *Fort* v. *Ward*, Serj. Moore's Rep. 667.)

But there is no extinguishment in equity. (*Styant* v. *Staker*, 2 Vern. 250.) It has long been the usual practice in voluntary enfranchisements to insert a re-grant of such commons, and the practice will probably be retained, though the Judicature Acts seem to have made it less necessary than it previously was. By 15 & 16 Vict. c. 51, s. 45, such commons are preserved after enfranchisement under the Copyhold Acts. Enfranchisement does not affect easements. (Scriv. Cop. ch. xiv.) Nor does it affect common of pastures in wastes which, though belonging to the lord, are out of the manor; because such common belongs to the land, and not to the estate. (*Crowder* v. *Oldfield*, 1 Salk. 170; and see *S. C.* at p. 366; 2 Ld. Raym. 1225.)

(8.) Settled land in England shall not be given in exchange for land out of England.

By 20 Geo. 2, c. 42, s. 3, it is enacted, "that in all cases where the kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any Act of Parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales, and the town of Berwick-upon-Tweed." This enactment was probably superfluous. (1 Bl. Com. 99.) 20 Geo. 2, c. 42, s. 3.

Special Powers.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly. Sect. 5. Transfer [*i.e., shifting*] of incumbrances on land sold, &c.

See s. 24, sub-sects. (4), (5), p. 235, *post*.

S.L.A.1882, Sect. 5.

"Incumbrance" of course here includes only incumbrances which are not defeasible by the exercise of the powers; as to which, see s. 20, sub-s. (2) (ii.), p. 219, *post*, and s. 50, sub-s. (3), p. 275, *post*. It would seem that such incumbrances might, on a *sale*, be discharged by the method provided in s. 5 of the Conv. Act, 1881, p. 15, *ante*. In respect to incumbrances created by a tenant for life over his own life estate, or an annuity charged upon the life estate by the settlor, there would be no practical advantage in resorting to that method; because it would be necessary to pay into Court a sum sufficient by means of its dividends to keep down the charge. The purchase-money, being capital money arising under the Act, seems not to be available for the purpose; and at all events, the extra ten per cent. mentioned in the Conv. Act, 1881, s. 5, p. 15, *ante*, and the incumbrancer's costs and expenses, could not be defrayed out of the purchase-money.

Since the tenant for life in exercising his powers is a trustee for all parties (s. 53, p. 279, *post*), and a trustee cannot in exercising powers give an advantage to one beneficiary at the expense of another, it seems clear that the tenant for life could not shift an incumbrance from one part of the settled land to another part going in remainder to a different person, so as to prejudice the latter. It seems to be the true meaning of s. 2, sub-s. (1), p. 184, *ante*, that several parcels of land, in which there is a single life estate, but several remainders to divers persons, constitute so many separate settled estates, although they are all settled by one instrument. If this interpretation should be supported, it will follow that incumbrances can be shifted from one part, only to another part going to the same person in remainder. And even supposing that the inheritance of one remainderman may be saddled with a burden shifted from that of another, it seems clear that the former would be entitled to be indemnified out of the consideration money, if any, or, in the case of an exchange or partition, by a lien on the land acquired or retained.

There seems to be no reason why the tenant for life should not, under this section, shift an incumbrance from leaseholds to freeholds included in the same settlement.

IV.—Leases.

General Powers and Regulations.

Sect. 6. Power for tenant for life to lease for ordinary or building or mining purposes.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years. S.L.A.1882, Sect. 6.

Leases to be derived out of leaseholds comprised in the settlement will be bounded by the term out of which they are derived; and leases of copyholds must conform to the custom of the manor.

A tenant for life cannot, it is conceived, properly comprise in a single lease properties having the same life estate but different remainders. Such properties seem to be different settled estates, though they may be comprised in the same instrument. See notes on s. 2, sub-s. (1), p. 184, and s. 5, p. 198, *ante*. Compare *Tolson* v. *Sheard*, 5 Ch. D. 19. At any rate the rents, covenants, &c., ought to be apportioned.

A tenant for life may, under a power in the settlement, lease to a trustee for himself. (*Bevan* v. *Habgood*, 1 J. & H. 222.) It is doubtful whether he might under the Act.

Upon the discretion of the tenant for life, as to the insertion of covenants, compare *Davies* v. *Davies*, 38 Ch. D. 499.

Payments made under a parol licence are in the nature of rent. (*Ex parte Hankey*, Mont. & Mac. 247.)

As to leases with option of purchase, see note, p. 246, *post*.

The statutory power of the tenant for life does not destroy, or make incapable of exercise, similar powers given to trustees (*Re Duke of Newcastle's Estates*, 24 Ch. D. 129); but such powers cannot be exercised without the consent of the tenant for life. See s. 56, p. 282, *post*.

Leases granted under this section are subject to the rights of incumbrancers paramount to the settlement. It seems practically to follow, that the tenant for life of a settled equity of redemption in a fee simple can grant leases only with the concurrence of such incumbrancers. He seems, however, to be able, while in possession, to grant leases, "according to his estate, interest, or right," under s. 18 of the Conv. Act, 1881, p. 59, *ante;* because to that extent he comes within the definition of "mortgagor" in the Conv. Act, 1881, s. 2, sub-s. (vi.), p. 5, *ante*, as being a person entitled to redeem. See *Riley* v. *Croydon*, 2 Dr. & Sm. 293. But such leases seem to be determinable with the determination of his own life; see the Conv. Act, 1881, s. 18, sub-s. (15), p. 66, *ante*. The fact that (see s. 21, sub-s. ii., p. 225, *post*) he may direct capital money arising under the Act to be applied in discharge of incumbrances affecting the inheritance of the settled land, does not make him a person entitled to redeem, because such capital money does not belong to him.

The tenant for life cannot, without obtaining the prescribed licence, grant valid leases of land comprised in the settlement only for a leasehold interest which is liable to forfeiture upon assignment or sub-letting without licence. See the Conv. Act, 1881, s. 14, sub-s. (6), (i.), p. 53, *ante*.

The Court would probably interfere, upon the application of the trustees or any person interested, to restrain any contemplated abuse of the power to grant leases "involving waste."

As to leases of the mansion-house, &c., see s. 15, p. 211, *post*.

Though an equitable tenant for life can grant leases under this section, it does not appear that he has any power to distrain

S.L.A.1882, Sect. 6. for the rent reserved by them. Proceedings by distress, being a remedy incidental to the legal reversion, must be taken in the name of the trustees in whom the legal estate is vested.

Sect. 7. Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

It would be inconsistent with this provision to insert a covenant for renewal. (See *Re Farnell's Settled Estates*, 33 Ch. D. 599.) And it is at least very doubtful whether a tenant for life can properly assent to any unusual stipulations in a lease, such as permitting the lessee to make alterations in the structure (other than building improvements, which would constitute a building lease, see note on s. 8, at p. 202, *post*), coupled with a covenant to reinstate the structure at the expiration of the term. In such cases the lessee might not get a good title, and the lessor might be liable in damages to the remainderman.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

As to best rent, see note on Conv. Act, 1881, s. 18, sub-s. (6), p. 62, *ante;* and see also The Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72, s. 11, sub-s. (1), printed at p. 195, *ante.*

In the case of building (or mining) leases, "best rent" may be calculated with regard to sums laid out by the tenant in improvements. See *Shannon* v. *Bradstreet*, 1 Scho. & Lef. 52, at p. 73; *Doe* v. *Bettison*, 12 East, 305, at p. 308.

If the tenant for life has incumbered his life estate, he cannot take a fine on granting a lease, without the consent of the incumbrancer. See s. 50, sub-s. (3), p. 275, *post.*

It is somewhat strange that the power of taking fines on granting leases seems to have been conferred on tenants for life generally, and without any restriction, merely by implication; and it might perhaps be doubted whether the words "regard being had to any fine taken" would properly authorize the acceptance of a fine under ordinary circumstances. They seem more apt to meet cases in which it has been usual to make profit by fines. (See *Doe* v. *Creed*, 4 Maul. & Sel. 371; *Right* v. *Thomas*, 3 Burr. 1441.) Compare the Settled Estates Act, 1877, s. 4, which contains no such provision.

Fines received under the Act for purposes of the settlement may be divided into,—

(1) Fines received on the renewal of a lease of settled land, of which the lessee could compel a renewal, as to which, see s. 12, sub-s. (ii.), p. 208, *post.*

(2) Fines received on the renewal of a lease previously made

by the tenant for life under the Act, and containing a covenant to renew,—assuming that such a covenant could be inserted into a lease made under the Act, with the assent of the Court under s. 10, p. 204, *post*. S.L.A.1882, Sect. 7.

(3.) Fines received on the grant of a lease *de novo* under the Act.

Fines of the class (1) are usual profits, to which the tenant for life is entitled. (*Brigstocke* v. *Brigstocke*, 8 Ch. D. 357.) They seem to be closely analogous to fines and heriots received on admissions to copyholds, when the settlement comprises a manor, which are payable to the tenant for life.

Fines of classes (2) and (3) would seem, upon general principles, to be capital money arising under the Act. And now, by the S. L. Act, 1884, s. 4, p. 302, *post*, provision is made to that effect.

As to the apportionment of fines *paid* for renewing renewable leaseholds comprised in the settlement, see note on s. 21, at p. 222, *post*, and the Trustee Act, 1888, s. 11, p. 322, *post*.

As to the application of fines taken on the granting of mining leases, see note on s. 11, p. 302, *post*.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

As to counterparts to leases, see Fawcett, Landl. & Ten. ch. iii. sect. (ii.), (5); Woodfall, Landl. & Ten. ch. v. sect. 2.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

This sub-section seems to refer to matters of fact or calculation such as are specified in sub-s. (2), *supra*; s. 8, sub-s. (3); and s. 13, sub-s. (5), *post*.

Building and Mining Leases.

Sect. 8. Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some

S.L.A.1882, Sect. 8.

other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with building purposes.

As to the meaning of building lease, see s. 2, sub-s. (10), (iii.), p. 191, *ante*.

This sub-section provides that a *repairing* lease—*i.e.*, a lease containing a covenant to *put* in repair, not merely to *keep* in repair, existing buildings—shall be a *building* lease. Compare *Doe* v. *Withers*, 2 B. & Ad. 896, and *Truscott* v. *Diamond, &c. Co.*, 20 Ch. D. 251. The powers in these two cases appear to have been framed with very different intentions, and the cases are, as was admitted by Jessel, M. R., in no way inconsistent one with the other. His depreciatory remarks upon *Doe* v. *Withers* seem to have been quite uncalled for.

As to past expenditure regarded as a consideration, see note on the Conv. Act, 1881, s. 18, sub-s. (9), p. 63, *ante*. A voluntary expenditure could not be described as "consideration," and it does not seem that such expenditure would justify the tenant for life in granting a lease under this section at less than the best rent mentioned in s. 7, sub-s. (2), p. 200, *ante*.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

This sub-section practically provides that the value of the

buildings erected under a building lease or agreement must be at least four times that of the land on which they stand. S.L.A.1882, Sect. 8.

In *Re Sabin's Settled Estates*, W. N. 1885, p. 197, a tenant for life granted a building lease of land in plots at a total rent of 100*l. per annum*. Buildings were erected on about one fifth part of the land, and leased at ground rents amounting altogether to 99*l.* 10*s. per annum*, and the remainder of the land was leased at a ground rent of 10*s. per annum*. The tenant for life afterwards proposed to sell the reversion of the last-mentioned land for 17*l.*; and Pearson, J., granted an injunction to restrain him from carrying out the sale, on the ground that the lease was not, in his opinion, a proper building lease within the Act. The lessee was not represented before the Court, and the judge did not finally decide that the lease was bad. It certainly seemed to be an improper use of the power, but it is difficult to make out that it did not come within the limits of the section. Probably it was considered an improper exercise of a discretion vested in a quasi-trustee.

In cases where, owing to the circumstances of the locality, a proportion not in accordance with this rule is contemplated, it will be necessary either to apply to the Court under s. 10, sub-s. (1), p. 204, *post*, or under the Settled Estates Act, 1877, which contains no such restriction.

9.—(1.) In a mining lease— Sect. 9.

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and Regulations respecting mining leases.

The words, "or any other land," refer to adjacent mines worked through mines in settled land by way of outstroke.

The provision about "facilities" seems by implication to empower the tenant for life to grant, or make allowance or provision for, such facilities in connection either with his own or a neighbouring mine.

(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

As to the different kinds of rents in mining leases, see note to s. 2, sub-s. (10) (ii), p. 190, *ante*.

S.L.A.1882, Sect. 9.

Sect. 6, p. 198, *ante*, enables way-leaves to be granted.

The Settled Estates Act, 1877, s. 4, permits a peppercorn rent, or any smaller rent than the rent which is ultimately made payable, to be made payable during any part of the first five years of a mining lease. The absence of a similar provision from this section is likely in the case of unopened mines to cause some inconvenience.

As to the apportionment of rents reserved by mining leases, see s. 11, *post*.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connection with mining purposes.

Sect. 10. Variation of building or mining lease according to circumstances of district.

10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this

Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order. S.L.A.1882, Sect. 10.

It is conceived that a tenant for life is, under the general power, entitled to grant mining leases containing stipulations usual in the district in which the mine is situated. This section enables the Court to authorize the insertion of powers which could not strictly be called necessary, *e.g.*, to build workmen's cottages. (See *Morris* v. *Rhydydefed Colliery Co.*, 3 H. & N. 885; 28 L. J. Ex. 119.)

For an example of an extended term being granted under the similar provision contained in the 19 & 20 Vict. c. 120, s. 2, re-enacted by the Settled Estates Act, 1877, s. 4, see *Re Cross's Charity*, 27 Beav. 592.

It is apprehended that, before the Court will consent to authorize the tenant for life generally to make such extended or different leases, a clear local custom must be shown to exist. In such cases a model lease will not ordinarily be required. See the S. L. Act Rules, 1882, r. 9, p. 376, *post;* which also see, as to leases authorized in particular cases.

It is possible that, on proof of a local custom, the Court would authorize the tenant for life to grant leases *de novo*, containing a covenant for renewal. If such a covenant were inserted by the tenant for life without the assent of the Court, it would be binding, during his lifetime, upon himself and purchasers from him with notice (*Taylor* v. *Stibbert*, 2 Ves. 437); unless, perhaps, in cases where the land remains in the settlement and the performance of the covenant can be shown to be injurious to the inheritance.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms III., IV., and V., pp. 379, 380, *post.*

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits. **Sect. 11.** Part of mining rent to be set aside as capital.

At common law a tenant for life, though impeachable for waste, may work mines (including quarries) already opened. It follows that he may lease them for his own life, or for years determinable with his life. As to the question whether a lease so made would be valid against a lessee claiming under a subse-

S.L.A.1882, Sect. 11.

quent lease made by the same tenant for life in exercise of his statutory power, see note on s. 50, at p. 276, *post*.

He may also open a new seam in an old mine, though such seam requires to be approached by a new shaft. (*Spencer* v. *Scurr*, 31 Beav. 334; *Clavering* v. *Clavering*, 2 P. Wms. 388; and see *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, at p. 466.)

The question whether he may reopen a disused mine, seems to depend upon whether the working was discontinued by the owner of the inheritance, with a view to some advantage to the property. (*Bagot* v. *Bagot*, 32 Beav. 509, at p. 517.) It seems that he may, if the discontinuance is of recent date and apparently not made with some permanent object.

But he may not work for commercial profit a mine which has been opened only for a more restricted purpose; *per* Selborne, L. C., in *Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454, at p. 465.

Dower is due out of open mines (*Stoughton* v. *Leigh*, 1 Taunt. 402); and, perhaps, out of mines opened after the husband's death before the dower has been assigned. (*Dickin* v. *Hamer*, 1 Dr. & Sm. 284.)

The effect of this section seems to be, so far as mining leases made under the Act are concerned—(1) to place opened and unopened mines upon the same footing; (2) to allow the tenant for life no privileges with regard to the former, so that, in order to exempt him from the description "impeachable for waste," he must, even with regard to opened mines, be *expressly* declared in the settlement to be unimpeachable for waste.

If a lease is granted under the statutory power, the lessee must generally have notice of the settlement; and in such mining leases as involve the outlay of capital by the lessee, it is often prudent to investigate the lessor's title. It is conceived that the lessee must pay the portion of the rent which is to be set aside as capital either to the trustees or into Court, as directed by s. 22, *post*, and that the trustees ought to see this arrangement carried into effect. But it is not easy to see by what title the trustees could recover any part of the rent from the lessee, if the lease were granted by a legal tenant for life, unless they are made parties to the lease; which, however, might of course be granted without their concurrence.

The present section contains nothing to hinder a tenant for life, even though impeachable for waste, from working opened mines, either personally or under any lease not granted by virtue of the Act, and receiving the whole profits or rents as income. If he be unimpeachable for waste, the same remark applies to unopened mines. And any fine taken on the granting of any lease which he is able to grant at common law, or under a power contained in the settlement, will belong wholly to him. A power authorizing him to grant leases on such terms "as he shall think fit," or "as shall seem reasonable and proper," is an arbitrary power, and will enable him, if unimpeachable for waste, to take a fine and appropriate it to his own use. (*Mostyn* v. *Lancaster*, 23 Ch. D. 583.)

But a lease purporting to be granted in exercise of a power

S.L.A.1882, Sect. 11.

will not, if void as an exercise of the power, take effect out of the estate (if any) of the donee of the power (see *Roe* v. *Archbishop of York*, 6 East, 86); unless for some special reason it should appear to be the intent of the parties that the lease should take effect *quâcunque viâ*.

Sale moneys of gravel, loam, peat, &c., sold by the trustees of a will in continuance of a custom pursued by the testator, have been held to belong to the tenant for life. (*Earl Cowley* v. *Wellesley*, 35 Beav. 635, at p. 639.)

So, too, royalties derived from brickfields, part of which had been leased by a testator, and the other part by his trustees in pursuance of an arrangement made by the testator, and in exercise of a power of leasing contained in his will. (*Ib.*, at p. 638.)

If a severance should take place between the mines and the surface, previous arrears of the mineral rent set aside will, in the absence of appointment to the contrary, follow the destination of the surface. (*Re Scarth*, 10 Ch. D. 499.)

For a provision regarding apportionment, similar to that contained in this section, see the Settled Estates Act, 1877, s. 4.

For an example of a "contrary intention expressed in a settlement," see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.

Where a mining lease reserves a rent payable in kind, a part of this must be "set aside as capital money." Since by s. 2, sub-s. (10) (ii.), *ante*, "payment in relation to rent includes delivery," it would seem that this part might be "delivered" into Court, at the option of the tenant for life, under s. 22, p. 231, *post*. It is conceived that the minerals ought first to be converted into money; but the Act does not say by whom the conversion is to be effected. The rules made under the Act, dated December, 1882, do not seem to have contemplated this difficulty; see Rule 11 and Form X. of the Appendix thereto, pp. 376, 381, *post*. The lessee should probably add to the summons taken out under Rule 10, an application for directions to convert.

There is nothing in the Act to forbid the taking of a fine on the grant of a mining lease any more than on the grant of any other lease. See s. 7, sub-s. (2), and note thereon, p. 200, *ante*. This fact seems to have been overlooked when the present section was inserted. The fine will, of course, be capital money.

See also note on S. L. Act, 1884, s. 4, p. 302, *post*.

If a tenant for life in exercise of a power in the settlement, or trustees in exercise of a similar power (with the consent of the tenant for life by virtue of s. 56, sub-s. 2 of the Act), should make a lease of mines, this does not in either case seem to be a mining lease made in exercise of the statutory power of leasing; and consequently the provisions of s. 11, as to setting aside part of the rent, do not apply to such a lease. In the case of concurrent powers vested in the tenant for life, one under the settlement and one under the Act, the lease ought to express clearly under which power it is intended to be made. These remarks are equally true with reference to other statutory powers; but, except with reference to mining leases, the distinc-

S.L.A.1882, Sect. 11.

tion between powers conferred by the settlement and powers conferred by the Act is not of great practical importance.

A person entitled for life to the income of land until sale, and afterwards to the income of the proceeds of sale, though he cannot strictly be described as impeachable for waste, is impeachable for waste within the meaning of this section. (*Re Ridge, Hellard* v. *Moody*, 31 Ch. D. 504.)

Special Powers.

Sect. 12. Leasing powers for special objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title; and

In this sub-section, the words, "for giving effect to," seem to mean, "in pursuance of." The phrase, "predecessor in title," seems to include both the settlor and the persons who take beneficially in succession under the settlement in priority to the tenant for life for the time being. "Successor in title," seems to be used to denote persons taking beneficially under the settlement, whose interests are subsequent to that of the tenant for life for the time being; though such persons are not in fact successors in the title of such tenant for life, but severally derive their title from the settlor. For other examples of the like misuse of the phrase, see s. 10, sub-s. (2), p. 204, *ante;* s. 20, sub-s. (2) (iii.), p. 220, *post;* s. 28 (*passim*), p. 241, *post;* and s. 63, sub-s. (2) (i.), p. 297, *post.*

In the case of a contract for a lease entered into previously to the settlement by a settlor absolutely entitled, of which the provisions are in excess of the power conferred by s. 6, p. 198, *ante*, this section empowers the tenant for life to carry out the contract. Previously, it would have been necessary either to submit to a decree for specific performance, or to obtain a private Act of Parliament. (*Cust* v. *Middleton*, 3 De G. F. & J. 33.)

(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and

As to the destination of fines receivable upon such renewals, see note on s. 7, sub-s. (2), p. 200, *ante.*

(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when con-

firmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require. S.L.A. 1882, Sect. 12.

This sub-section seems to empower the tenant for life to correct only defects in point of form, or of title at the time of the grant. It does not appear that he has under this sub-section power to give a gratuitous benefit to the holder of the void or voidable lease, but only to give him such rights as he could enforce against the settlor's estate, either by virtue of 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, or else by virtue of covenants for title contained in a void or voidable lease purporting to be made by an absolute owner.

It would also seem that for such a confirmation, any notice which, by virtue of s. 45, p. 267, *post*, and the S. L. Act, 1884, s. 5, p. 302, *post*, would be necessary for the grant of a new lease in similar terms, ought to be given. It is also possible that, if a lease had been granted at too low a rent, it might lawfully be confirmed, if by depreciation in values the rent should subsequently come to be a fair rent.

Surrenders.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them. Sect. 13. Surrender and new grant of leases.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the

S.L.A. 1882, Sect. 13.

determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

As to surrenders generally, see Com. Dig. tit. *Surrender;* Co. Litt. 337; Prest. Shep. T. 303.

A surrender must be of the whole estate of the surrenderor, but not necessarily in the whole of the land.

At law there must be privity of estate between the surrenderor and surrenderee. Though this section enables an equitable tenant for life to *accept* surrenders of leases, by whomsoever made, it is conceived that the actual surrender should be made to the person having the immediate remainder or reversion upon the lease surrendered.

As to surrenders of contracts for leases, see s. 31, sub-s. (1), (iv.), p. 247, *post.*

On the surrender of a lease, the compensation may, according to circumstances, be payable either to or by the lessee. But the Act does not enable the tenant for life to apply capital moneys in payment of compensation to the lessee; although the value of the lessee's interest may be taken into account if a new lease is granted on the surrender. See sub-s. (5), *supra.*

It has been suggested, that when compensation is paid by the lessee in consideration of the acceptance of a surrender of the lease, it must be treated as capital money. The Act is silent upon this point. But it seems to be a fairer method to apportion the compensation money between the tenant for life and remainderman, in the same way as if it were consideration money received for the sale of leaseholds comprised in the settlement; as to which, see note on s. 34, p. 251, *post.* The extinguishment, by acceptance of a surrender, of a term which is onerous to the lessee, and therefore beneficial to the settlement, seems to have much the same practical effect, so far as the interests of persons taking under the settlement are concerned, as a sale of a beneficial leasehold comprised in the settlement.

The lessee paying such compensation money cannot safely pay it to the tenant for life. The same remark applies to compensation paid for dilapidations, in lieu of repairing. Such moneys seem to be capital money, and should be either paid into Court, or to the trustees, under s. 22, p. 231, *post.*

The last four sub-sections contemplate the making of a new lease, which is made in consideration (partly or wholly) of the surrender, and must take effect immediately upon the surrender. If the surrender and new lease are not both made parts of the same transaction, it does not appear that the interest of the lessee might be taken into account in arranging the terms of the new lease.

As to fines taken on the grant of a new lease, see note on s. 7, sub-s. 2, p. 200, *ante.*

S.L.A. 1882, Sect. 14.

Copyholds.

Power to grant to copyholders licences for leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

See the corresponding provision in the Settled Estates Act, 1877, s. 9.

Except by special custom, a copyholder cannot grant a lease of his copyhold for longer than a year without incurring forfeiture. If the copyholder should agree to lease for a year, *et sic de anno in annum*, reserving one day in every year, it is still a forfeiture. (*Lutterel* v. *Weston*, 1 Bulst. 215.) But in *Worley* v. *Frampton*, 5 Ha. 560, the point was not raised, although the covenant in that case seems to have been equally objectionable.

It is conceived that this section gives no greater powers to the tenant for life than he would have if he were seised in fee simple of the manor, and that he cannot by virtue of it exceed the customs of the manor.

In manors where there exists a custom that the copyholder, on payment of a fine, can obtain a licence to lease as of right, such fines seem to be casual profits, and to belong to the tenant for life.

Of course, a tenant for life who is lord (for life) of a manor can exercise his right at common law to make fresh grants of copyholds; and if there is a special custom in the manor to make grants *de novo* of parcels of the waste to be held by copy of court roll, fines taken upon such grants will belong to the tenant for life, although they may be larger than the fines payable upon ordinary admittances. (*Earl Cowley* v. *Wellesley*, 35 Beav. 635, at p. 640.)

V.—Sales, Leases, and other Dispositions.

Mansion and Park.

Sect. 15. Restriction as to mansion house, park, &c.

15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occu-

S.L.A. 1882, Sect. 15.

pied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.

This restriction is not extended to exchanges.

As to the persons who will come within the definition of trustees for the purposes of this section, see note on s. 2, sub-s. (8), p. 188, *ante*.

Any apartment held under a separate tenancy, in which the tenant resides, is, in law, a mansion house; as, for example, a chamber in an Inn of Court. (Kel. 27; *Evans & Fynche's Case*, Cro. Car. 473.)

The phrase "on any settled land," seems to imply, that where the settlement comprises more than one property, each separate property may have a principal mansion house of its own. It could hardly be said that a principal mansion house in Devonshire is "on any settled land" in Durham.

A reasonable interpretation must be given to this section. It is not every settled estate comprising a dwelling-house which can be supposed to have a "principal mansion house," especially when the tendency of sect. 63, *post*, to bring trifling settlements within the scope of the Act is considered. It is clear that old historical mansions are within this section; it is equally clear that a suburban villa is not. (*Re Spurway's Settled Estates*, 10 Ch. D. 230, at p. 233.) But questions of serious difficulty are likely to arise with respect to some properties lying between these extremes.

As this section has evidently been enacted in the interest of the remainderman, it seems reasonable to conclude that in cases where a sale or leasing of the principal mansion house, &c., can reasonably be regarded by the remainderman as a serious grievance, the Court will hesitate to consent thereto. Such grievance might reasonably be only founded upon sentiment, provided the sentiment be such as commonly has practical weight in the affairs of life. In many cases, the grievance would rest upon a more substantial ground, such as the loss of caste and position likely to follow upon the alienation of an old family mansion. For some remarks upon the principles by which the Court is guided, see *Marquis Camden* v. *Murray*, "The Times," 19th July, 1883 (*a*).

As to the consent of the trustees to such sale or leasing, it must be borne in mind that though, by virtue of s. 42, p. 264, *post*, the trustees incur no liability for giving consents, &c., yet they do not cease to be trustees for all parties interested under the settlement merely because the tenant for life is placed in a similar position by s. 53, p. 279, *post*. It is, however, conceived that the Court will not, except in extreme cases, interfere with the trustees as to giving their consent, which is in the nature of

(*a*) "The Times" report of the judgment in this case is printed in Appendix II., p. 414, *post*. A previous attempt had unsuccessfully been made to obtain an order for sale in an administration action. See *S. C.*, 16 Ch. D. 161.

the exercise of a discretion. But it is possible that if the tenant for life, having power to appoint new trustees, should appoint manifestly unfit persons, such appointment would afford a sufficient ground for the Court to review any consent given by them. S.L.A. 1882, Sect. 15.

The intention of the section must be to enable the tenant for life to appeal to the Court from a refusal by the trustees, or where they decline the responsibility. The power to apply to the Court cannot have been intended to be given only when there are no trustees, because in such a case trustees must be appointed for the purpose of receiving notice, under s. 45, p. 267, *post*. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.) But the tenant for life does not seem to be bound to apply to the trustees before applying to the Court.

When a will creating a settlement contains express provisions against a sale of the mansion house by the trustees, the Court is not hindered from consenting to a sale; but if personal chattels are settled to devolve with the mansion house, the Court will require, before consenting to a sale of the house, that some arrangement shall be made respecting the chattels. (*Re Brown's Will*, 27 Ch. D. 179.) It may be doubted whether in such a case the trustees could with propriety consent to a sale of the mansion house without a reference to the Court.

No condition as to residence will prevent the operation of this section, see note on s. 51, at p. 279, *post*, and *Re Paget's Settled Estates*, 30 Ch. D. 161, there cited; though, of course, the condition must be performed so long as the house remains unsold. (*Re Haynes*, *Kemp* v. *Haynes*, 37 Ch. D. 306.)

Where the tenant for life has mortgaged his life interest to its full value, the Court will not, in its discretion under this section, consent to a sale on his application, without full information as to the proposed sale and the consent of the mortgagees. (*Re Sebright's Settled Estates*, 33 Ch. D. 429.) As to this case, see further, note on s. 50, at p. 277, *post*.

The same principles apply to the exercise of the statutory power of leasing. (*Re Thompson's Will*, 21 L. R. Ir. 109.)

As to the service of notices in applications under this section, see the S. L. Act Rules, 1882, r. 4, p. 375, *post*. See, also, for provisions as to the form of the lease, *ibid.*, r. 9.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms IV., V., VI., VII., *post*.

Streets and Open Spaces.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,— Sect. 16. Dedication for streets, open spaces, &c.

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously

S.L.A. 1882, Sect. 16.

or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Compare the Settled Estates Act, 1877, s. 20.

The phrase "open spaces" seems here to include certain "enclosed spaces," such as gardens, of which the use is confined to the neighbouring residents.

It is clear that the "general benefit" of the residents is the only, or at least the principal, object to be kept in view; and it is conceived that such benefit must be such as to bring in a sufficient pecuniary compensation to recoup to the settlement the loss of the land so dedicated; also, that any proposed scheme must be such as is usual with regard to similar undertakings. There is nothing to authorize a scheme designed for the benefit of the public generally; though there is no reason why the public should not incidentally obtain a benefit, provided that it be not such as to deteriorate the estate.

The costs of carrying out any improvement under this section may be paid for out of capital moneys under the Act. See s. 25, sub-s. (xvii.), p. 238, *post*. If no such money is available, the tenant for life may raise such moneys for the purpose by a sale of some other part of the settled land. If an application is made under the Settled Estates Act, 1877, s. 21, to have the money

raised by mortgage, the scheme must also be sanctioned by the Court under that Act. The present Act contains no power to raise money by mortgage for the purpose. S.L.A. 1882, Sect. 16.

In urban districts it is usually advantageous to the estate to extend the use of necessary roads to the public, because such roads are usually adopted and maintained by the local authority.

By the 36 & 37 Vict. c. 50, a tenant for life, with the concurrence of the person next entitled for a beneficial interest in remainder in fee simple or fee tail, or his guardian, if an infant, may grant a site not exceeding one acre for the erection of a place of public worship; and may convey such site, whether he has the legal estate or not. A father who is tenant for life may concur as guardian on behalf of his infant son. (*Re Marquis of Salisbury*, 2 Ch. D. 29.)

When a garden or open space has been set apart under this section, the tenant for life may interfere to prevent abuse of it. Before the coming into operation of the Judicature Act, 1873, it was held by Hall, V.-C., that the owner in fee simple of a common garden, over which his tenants had rights of enjoyment, was entitled to an injunction to restrain a contractor, employed by the tenants to improve the garden, from committing a nuisance. (*Allen* v. *Martin*, L. R. 20 Eq. 462.) A tenant for life having the legal estate would clearly have had the same right; and it is conceived that an equitable tenant for life, having no right at law, is even more clearly entitled to the aid of equity.

At to the powers of public bodies in the Metropolis to acquire and manage open spaces, see 18 & 19 Vict. c. 120, ss. 144, 239; 19 & 20 Vict. c. 112, ss. 10, 11; 26 & 27 Vict. c. 13; 40 & 41 Vict. c. 35; 44 & 45 Vict. c. 34.

Surface and Minerals apart.

Sect. 17. Separate dealing with surface and minerals, with or without wayleaves, &c.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

Under an ordinary power of sale and exchange, trustees cannot sell or exchange the surface apart from the minerals. (*Buckley* v. *Howell*, 29 Beav. 546.)

S.L.A. 1882, Sect. 17.

See, further, as to "reservations" upon an exchange, s. 4, sub-s. (6), p. 196, *ante*.

The power to grant easements, &c., over the settled land given by this section is exerciseable as incidental to a scheme of the kind contemplated by this section with respect to mines, while the power given by s. 3, sub-s. (i), p. 192, *ante*, and s. 6, p. 198, *ante*, seems to be only exerciseable by way of sale and lease respectively, at the best price or rent, &c., and subject to the provisions respecting sales and leases.

Mortgage.

Sect. 18. Mortgage for equality money, &c.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act.

The tenant for life can raise money by mortgage for no purpose other than those mentioned in this section. He cannot give a discharge for money so raised, which, being capital money, must be paid into Court, or to the trustees. (See s. 22, p. 231, *post*.) Notice of his intention to exercise the power must be given as directed in s. 45, p. 267, *post*, as amended by the S. L. Act, 1884, s. 5, p. 303, *post*. It is conceived that money can be so raised, only when a definite contract for enfranchisement, &c., has been concluded, under which the money will be required.

Since the amount required is generally capable of exact computation, there will, under ordinary circumstances, be no excuse for raising money in excess of what is wanted; though, perhaps, a moderate margin may be allowed, when raising the precise sum necessary would be disadvantageous or inconvenient.

Although the mortgagee, on obtaining the receipt of the trustees, or paying the money into Court (see s. 22, p. 231, *post*), will not be bound to see to the application of the money (s. 40, p. 263, *post*), he cannot safely lend a larger sum than is necessary. Mortgagees advancing money under this section may prudently obtain from the trustees some assurance that they raise no objection against the mortgage. It is quite possible that the trustees might be obliged to receive the money, if tendered to them, even though, in their opinion, it had been improperly raised.

By s. 46, sub-s. (6), p. 270, *post*, and s. 47, p. 271, *post*, the Court has power to direct money to be raised by mortgage for the payment of costs, charges, and expenses. (See note on s. 46, sub-s. 6.)

S.L.A. 1882, Sect. 18.

The decision of the Court of Appeal in *Mostyn* v. *Lancaster*, 23 Ch. D. 583, may raise some doubt whether a tenant for life may not make a lease by way of mortgage, taking a fine.

In cases where it is desired to raise money by the creation of a rent-charge for effecting improvements, recourse must be had to the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). By s. 30, p. 245, *post*, the improvements authorized by the present Act are incorporated into the Act of 1864. Money may also be so raised for drainage under the Public Money Drainage Acts, 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 13 & 14 Vict. c. 31; and 19 & 20 Vict. c. 9. As to water supply, see the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31). And under the Settled Estates Act, 1877, ss. 20, 21, money may be raised by mortgage or charge, for constructing streets, gardens, sewers, water-courses, &c.

If money is required to be raised for any purpose upon which capital money might be expended under s. 21, sub-s. (x.), p. 230, *post*, it is possible that the Court may assume jurisdiction to permit the money to be raised by mortgage under s. 46, sub-s. (6), p. 270, *post*, and s. 47, p. 271, *post*, though it appears more probable that the "costs, charges, and expenses" there mentioned, include only those which are incident to some application or proceeding in Court; and the rules (see S. L. Act Rules, 1882, r. 3, p. 375, *post*) do not seem to provide for any others; nor is any express authority given to the tenant for life to make an application for the mere purpose of getting recouped his expenses incurred in exercising his powers. If money is required to be raised for such purposes, it would be the safer course to apply under the Settled Estates Act, 1877, if the proposed scheme comes within its scope.

Undivided Share.

Sect. 19. Concurrence in exercise of powers as to undivided share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

As a general rule, persons possessed of undivided shares, though placed in a fiduciary position, may concur with the owners of other undivided shares in exercising powers. In such cases the presumption is, that greater advantages will be obtained by concurrence. (*Re Cooper to Harlech*, 4 Ch. D. 802, at p. 817.)

The Act does not authorize the tenant for life to concur with the owners of *adjacent properties* in exercising powers. As regards selling, such concurrence is at the risk of the fiduciary owner, upon whom the onus lies of showing that a better price

S.L.A. 1882, Sect. 19.

has been obtained by such concurrence. (*Re Cooper to Harlech, ubi supra*, at p. 816.) As regards leasing, such concurrence is improper. (*Tolson* v. *Sheard*, 5 Ch. D. 19; and see note on the Conv. Act, 1881, s. 35, at p. 101, *ante*.)

But s. 27, p. 241, *post*, empowers the tenant for life to concur with adjacent owners, or other persons, in executing authorized improvements.

Sect. 2, sub-s. (10) (i.), p. 189, *ante*, provides that land shall include an undivided share of land. The present section is, therefore, not required for enabling the tenant for life to sell an undivided share comprised in the settlement, if he is willing to sell it separately. As to *Re Collinge's Settled Estates*, 36 Ch. D. 516, see note on s. 2, sub-s. (10) (i), p. 189, *ante*.

Conveyance.

Sect. 20. Completion of sale, lease, &c. by conveyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

It is conceived that the phrase, "estate or interest the subject of the settlement," will not include, or enable to be conveyed, outstanding legal estates which are vested neither in the trustees of the settlement, nor by virtue of the settlement in any of the beneficiaries. Compare Conv. Act, 1881, s. 21, sub-s. (1), and note thereon, p. 72, *ante*.

As to whether, and how far, the tenant for life can exercise the powers conferred by the Act, when he has absolutely assigned his life interest, see note on s. 50, sub-s. (1), at pp. 276, 277, *post*.

On the question, whether a lease made at common law, not under his statutory power of leasing, by the tenant for life, is valid against a lessee claiming under a subsequent lease made by him in exercise of his statutory power, see note on s. 50, at p. 276, *post*.

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limi-

tations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of— S.L.A.1882, Sect. 20.

The words "under this Act" must refer to the words "expressed or intended to operate," because so far as the purport of the deed exceeds the capacity or power of the tenant for life by the common law, it could not operate at all, except "under this Act." Therefore the deed must be either expressed or intended to operate under the Act; and it is conceived that the intention, if not expressed, must be collected from the contents of the deed itself, and not by reference to extraneous matter. Any other doctrine would open a door to fraud, especially in the case of mining leases, where part of the rent is to be set aside as capital.

Though it is conceived that the mere fact that the purport of a deed, which makes no mention of this Act, is in excess of the capacity at common law of the tenant for life, but is within his statutory powers under the Act, will probably suffice to make the deed an exercise of the statutory powers, yet it will be better to make express reference to the Act.

As the conveyance by the tenant for life discharges the limitations of the settlement, it follows that the purchaser takes the land freed from succession duty payable on deaths subsequent to the purchase. See the Succession Duty Act, 1853, 16 & 17 Vict. c. 51, s. 42, and *Re Warner's Settled Estates, Warner to Steel*, 17 Ch. D. 711, a case under the Settled Estates Act, 1877.

(i.) All estates, interests, and charges having priority to the settlement; and

These expressions will probably be held to include, and to protect, the rights of the lord of the manor with regard to copyholds comprised in a settlement; though such rights are more properly said to be "paramount to" the settlement than to "have priority to" it. This point is of importance chiefly in reference to the powers of leasing given by the Act.

(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

This seems to refer to and include—

(1) Mortgages made by virtue of s. 18 or s. 47 of the present Act;

(2) Mortgages made by trustees, or others, under any power to mortgage contained in the settlement.

Such powers, if designed to raise money for any purpose other than those specified in s. 18 and s. 47 of the present Act, would not be powers "exerciseable for any

In re Marquis of Salisbury & Lord Tredegar 1893. 2 Ch.

S.L.A. 1882, Sect. 20.

purpose provided for in this Act," and therefore the consent of the tenant for life is not necessary to their exercise by virtue of s. 56, sub-s. (2), p. 282, *post*. See note thereon.

(3) Charges made by virtue of any of the Acts specified in the note on s. 18, p. 216, *ante;*

(4) Sums of money actually raised by way of portions under any power in that behalf contained in the settlement, and charges for securing the same.

Portions directed to be raised, but not actually raised at the date of the deed, and also rights of jointure, are defeated by the conveyance of the tenant for life. The claims so defeated will still remain valid as against all capital moneys arising by the exercise of the powers; which, therefore, cannot be applied under s. 21, *post*, in such a way as to prejudice such claims.

A complete title, free from incumbrances, can of course be made with the concurrence of all persons entitled to any such charge as above mentioned. In such a case, when the incumbrancer has the legal estate and concurs in the conveyance, he will be the proper person to convey, discharged from his incumbrance; and the tenant for life will confirm.

Trustees of the settlement for purposes of the Act need not be made parties, unless to any assurance, where their consent is necessary, by virtue of s. 15, p. 211, *ante*. In cases where the purchase-money is not intended to be paid into Court, they should be made parties in order to obtain their receipt.

(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced

to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls. S.L.A. 1882, Sect. 20.

This section seems to contemplate the production of a portion only of the settlement. In cases where the settlement consists of a conveyance to trustees on trust to sell, with a separate declaration of the trusts of the purchase-money, it would not, independently of the S. L. Act, 1884, s. 7, p. 305, *post*, have sufficed to produce the conveyance alone, because, by virtue of s. 63, p. 294, *post*, it would have been necessary to inspect the trusts in order to ascertain the person entitled to the income of the land until sale.

No machinery is provided whereby the tenant for life can enforce production of the "settlement," in cases where he neither has nor is entitled to the custody of it.

If copyholds are devised to trustees upon trust to sell, and the tenant for life under s. 63, p. 294, *post*, sells under the Act before the trustees are admitted, the purchaser is only bound to pay one fine. (*Re Naylor and Spendla's Contract*, 34 Ch. D. 217.) But as to sales under s. 63, see S. L. Act, 1884, s. 7, referred to *supra*.

VI.—Investment or other Application of Capital Trust Money.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely): Sect. 21. Capital money under Act; investment, &c. by trustees or Court.

See also the Agricultural Holdings (England) Act, 46 & 47 Vict. c. 61, s. 29, at p. 412, *post*.

The phrase, "capital money arising under this Act," has been liberally interpreted by Chitty, J., to include money directed by a will to be laid out in the purchase of land to be settled in strict settlement, apart from the question, whether the investment of the money as capital money arising under the Act would be authorized by s. 33, p. 250, *post*. (*Re Mackenzie's Trusts*, 23 Ch. D. 750.) The ground of the decision seems to have been, that it would be idle to prevent the tenant for life from doing directly what he could do circuitously. (See also *Re Tennant*, W. N. 1889, p. 47.) But it is not certain that a tenant for life who proposed to buy land with a view to an immediate re-sale, might not be restrained from so abusing his powers. See s. 53, p. 279, *post*.

The words, "subject . . . . to application thereof for any

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special authorized object for which the same was raised," seem to refer to s. 18, p. 216, *ante* (where see note), and to imply that money raised under that section cannot be invested under this; unless, perhaps, in the case of some unavoidable surplus.

When renewable leaseholds are comprised in the settlement, the Act has omitted to state how, in the absence of directions contained in the settlement, fines paid for renewal are to be apportioned. The same remark seems also to apply to the Trustee Act, 1888, ss. 10, 11, pp. 321, 322, *post*. Therefore the old rule seems to be preserved; as to which see *Bradford* v. *Brownjohn*, L. R. 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. D. 706, and the cases there cited. Whether the lease is renewable under a covenant, or only by custom, makes, for this purpose, no difference. According to this rule, the tenant for life and remainderman contribute in proportion to their *actual* enjoyment of the renewed term, so that their respective contributions cannot be finally ascertained until the death of the tenant for life; and it therefore seems that capital money arising under the Act cannot be applied to this purpose, unless such application be authorized by the settlement. Settlements may, in future, usually contain such authority; but this should be expressed to be without prejudice to the rule of apportionment above referred to.

The Trustee Act, 1888, s. 11, p. 322, *post*, enables the amount of the fine, under certain circumstances, to be raised by mortgage; but it may sometimes be convenient to insert a more comprehensive power in settlements.

Renewable leaseholds are for the most part granted by colleges and ecclesiastical corporations. In the latter case, by 23 & 24 Vict. c. 124, s. 35, the purchase-money, on a purchase of the reversion, may be charged upon the lands. And see also sects. 36, 37, of that Act.

By Lord Cranworth's Act, ss. 8, 9, trustees were authorized to pay the expenses of the renewal out of money held by them upon similiar trusts, or to raise the money by mortgage. These sections are repealed by s. 64, p. 299, *post*, and their provisions were not re-enacted until the passing of the Trustee Act, 1888, ss. 10, 11, pp. 321, 322, *post*.

See further, as to renewable leaseholds, Lewin on Trusts, 8th ed. Chap. XV.

The Court has no jurisdiction to order capital moneys to be paid to persons residing abroad, even though all the beneficiaries are domiciled in a foreign country. (*Re Lloyd*, *Edwards* v. *Lloyd*, W. N. 1886, p. 37; 54 L. T. 643.)

In *Round* v. *Turner*, The Times, 13th February, 1889, Kay, J., refused to permit a charge to be created upon the purchase-money to be paid under a contract for the sale of agricultural land, for the purpose of working the farm pending completion.

(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of

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the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

Trustees having power to invest in "government securities" or parliamentary stocks, funds, or securities, or any of them, are by law authorized to invest in any mode in which cash under the control of the Court may be invested. (See 23 & 24 Vict. c. 38, ss. 10, 11.) The phrase "government securities" seems here to have the same meaning as in the Court of Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), s. 3, namely, "any annuities, exchequer bonds, exchequer bills, and other parliamentary securities of the government of the United Kingdom."

By the order of 1st February, 1861 (now annulled), it was declared that cash under the control of the Court might be invested in—

Bank stock;
East India stock;
Exchequer bills;
£2 10*s.* annuities;
Mortgage of freeholds and copyholds in England and Wales. [This would not include railway mortgages. *Mortimore* v. *Mortimore*, 4 De G. & J. 472.]
Consols;
Reduced threes;
New threes.

The above-mentioned order of 1st February, 1861, was annulled by R. S. C. 1883, Ord. XXII. r. 17. This was altered by Rule 1 of August, 1888, which was in turn altered by Rule 1 of November, 1888. The list of investments, as from the 26th of November, 1888, now stand as follows:—

Two and three-quarters per cent. consolidated stock (to be called after the 5th of April, 1903, two and a-half per cent. consolidated stock);
Consolidated £3 per cent. annuities;
Reduced £3 per cent. annuities;
£2 15*s.* per cent. annuities;
£2 10*s.* per cent. annuities;
Local loans stock under the National Debt and Local Loans Act, 1887;
Exchequer bills;
Bank stock;
India three and a-half per cent. stock;
India three per cent. stock;
Indian guaranteed railway stocks or shares, provided in each

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case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment;

Stocks of colonial governments guaranteed by the imperial government;

Mortgage of freehold and copyhold estates respectively in England and Wales;

Metropolitan consolidated stock, £3 10*s.* per cent.;

Three per cent. Metropolitan consolidated stock;

Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares;

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stocks shall not be liable to be redeemed within a period of fifteen years from the date of investment;

[The annulled rule of August, 1888, proposed to make certain of these investments permissible only by an order of a judge in person, and to add, under a like order, the following:—The inscribed stock of any British colony, provided that such inscribed stock shall not at the time of investment be quoted in the official list of the London Stock Exchange at a price below £105 sterling for every £100 of inscribed stock bearing interest at the rate of four per cent. per annum, or in the case of inscribed stock bearing interest at a lower rate than four per cent. per annum below the price proportionate to £105 sterling for £100 of inscribed stock at four per cent. per annum.]

By 22 & 23 Vict. c. 35, s. 32, trustees, not expressly forbidden so to do, may invest in—

Real securities in any part of the United Kingdom. [This, of course, does not include equitable mortgages. See *Swaffield* v. *Nelson*, W. N. 1876, p. 255. It includes turnpike road bonds; see *Robinson* v. *Robinson*, 1 De G. M. & G. 247; and it seems to make no difference whether the toll-houses are or are not included in the security, see *Cavendish* v. *Cavendish*, 24 Ch. D. 685, at p. 690; but such bonds are a dubious investment for trustees, *Robinson* v. *Robinson*, *supra*, at p. 263. The last observation applies to railway mortgages, *Mant* v. *Leith*, 15 Beav. 524. *Cavendish* v. *Cavendish* was reversed on appeal, 30 Ch. D. 227, but the question related to the construction of a specific devise, and the decision must not be taken to interfere with *Robinson* v. *Robinson*. The phrase "real securities," also includes charges, or mortgages of charges, created under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114); see s. 60; and by the Trustee Act, 1888, s. 9, p. 321, *post*, a power to invest in real securities is to authorise investment upon mortgage of a long term having not less than 200 years unexpired, and not subject to a reservation of rent greater than one shilling a year: which terms, it should be noted, by reason of the possible reservation of a rent

having a money value, may be incapable of enlargement under the Conv. Act, 1881, s. 65, p. 142, *ante*];

Stock of the Bank of England or Ireland;

East India Stock.

By 30 & 31 Vict. c. 132, s. 1, East India Stock includes stock created after as well as before the date of 22 & 23 Vict. c. 35. It has been held that this does not include the stock of railways whereof the interest is guaranteed by the Indian Government. (*Green* v. *Angell*, W. N. 1867, p. 305.) This enactment is extended to India Stock subsequently created, by 32 & 33 Vict. c. 106, s. 16; 36 Vict. c. 32, s. 16; 37 Vict. c. 3, s. 17; and 42 & 43 Vict. c. 60, s. 18. See also *Ex parte St. John Baptist's College, Oxford*, 22 Ch. D. 93.

Trustees may invest in any securities guaranteed by parliament (30 & 31 Vict. c. 132, s. 2), or in stock of the Metropolitan Board of Works (34 & 35 Vict. c. 47, s. 13).

By the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 27, trustees authorized to invest in the debentures or debenture stock of any railway or other company may, unless the contrary is provided by the instrument authorizing such investment, invest in local authorities' loans issued under that Act. Since the S. L. Act authorizes investment in the debentures of railways, it would seem that investment in the last-named loans is authorized if the local authority has paid dividends on the loan for the ten years before the investment. See *Re Maberly, Maberly* v. *Maberly*, 33 Ch. D. 455.

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

The power to redeem mortgages is restricted to such mortgages as affect the whole estate in the mortgaged land the subject of the settlement. This restriction permits redemption of mortgages of leaseholds made by assignment, but not in strictness of those made by demise. Nor would it in strictness permit redemption of mortgages effected by deriving a long term of years out of a fee simple. It would be a misuse of language to say that the creation of a mortgage for any estate less than the whole estate "affects" the whole estate, although it may affect the pecuniary interests of the persons entitled thereto.

But since a mortgage by demise commonly contains a trust of the outstanding term, and since a long term made by way of mortgage is commonly such as, *after foreclosure*, might be enlarged into a fee simple by virtue of the Conv. Act, 1881, s. 65, p. 142, *ante*, it is possible that these kinds of incumbrances may be held to come within the section, though they cannot have been intended by its language; and this view has been

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taken by North, J., in *Re Frewen, Frewen* v. *James*, 38 Ch. D. 383. And it is difficult to see that trustees would incur any practical danger by permitting them to be redeemed with capital money.

When there is a life estate in several parcels of land, followed by distinct remainders in respect of the several parcels, there seem to be as many distinct settlements as there are distinct remainders; see note on s. 5, at p. 198, *ante*. It is conceived that, under such circumstances, a mortgage affecting one parcel could not be discharged by means of capital money arising out of another parcel.

The word *incumbrance* in this sub-section did not include terminable charges, even though created for purposes coming within the scope of the present Act. (*Re Knatchbull's Settled Estate*, 29 Ch. D. 588.) But see now the S. L. A. 1887, s. 1, p. 310, *post*, and note thereon.

Capital money may be applied in discharging incumbrances, though not affecting the whole of the settled land. (*Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Navan, &c. Railw. Co.*, 21 L. R. Ir. 369.)

When lands are settled by a testator, subject to a charge of his debts, it would not seem that the trustees are entitled under this sub-section to apply capital moneys in discharging the debts unless the testator's personalty is insufficient to discharge the debts and legacies. Pecuniary or specific legatees would be entitled to have assets marshalled in their favour, but this privilege does not in ordinary cases apply to residuary legatees; so that, in the case supposed, to pay off debts out of capital moneys would be to benefit the residuary legatee at the expense of the settlement. In order to entitle the residuary legatee to the privilege of marshalling, some special intent to exonerate the personalty must appear in the will. See, on this subject, Jarman on Wills, c. 46, pt. 3. This enactment extends to an annuity charged upon tithes, the subject of a settlement. (*Re Esdaile, Esdaile* v. *Esdaile*, W. N. 1886, p. 47; 54 L. T. 637.)

It has been decided by the C. A. that capital moneys arising by the sale of quasi-heirlooms, sold under s. 37, p. 256, *post*, may be applied under this sub-section, at the request of the tenant for life, in discharge of incumbrances. (*Re Duke of Marlborough's Settlement, Marlborough* v. *Marjoribanks*, 32 Ch. D. 1.) Such application is obviously prejudicial to a remainderman, in whom the chattels, if unsold, would vest absolutely upon his attaining twenty-one.

(iii.) In payment for any improvement authorized by this Act:

See s. 25, p. 235, *post*, and s. 22, sub-s. (2), p. 231, *post*, and note thereon.

(iv.) In payment for equality of exchange or partition of settled land:

(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in

purchase of the fee simple of any part of the settled land, being copyhold or customary land: S.L.A. 1882, Sect. 21.

See s. 3, sub-s. (ii.), and note thereon, p. 193, *ante*.

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

In some cases purchases made under this sub-section are likely to be more beneficial to the remainderman than to the tenant for life. Difficulty may arise both in adjusting their rights and also in settling the proper form of conveyance. Leaseholds, when comprised in strict settlements, are commonly settled by means of trusts, to go, as nearly as may be, according to the uses previously declared of freeholds; but by will the legal estate may be vested in a tenant for life with a quasi-remainder over; see note on the Conv. Act, 1881, s. 65, p. 142, *ante*. In the former case the remainderman commonly is, and in the latter case he may be, a tenant in tail. In the event of his interest becoming an absolutely vested interest before the expiration of the term, such tenant in tail will be absolutely entitled to the whole residue. To merge this term in the reversion would therefore alter the rights of the parties. In the case of an infant or lunatic tenant in tail taking a vested interest, and in any other cases where the entail cannot be barred by the tenant in tail, the alteration would be practically important, but not where the tenant in tail can bar the entail as easily as he might dispose of the term. If the tenant in tail should die under age, the term would belong absolutely to his estate, while the estate tail in the reversion upon the term would descend to the heir (if any) in tail, or to the next remainderman, or the reversioner, upon the estate tail. It is possible that, where the term and the estate tail in the reversion would devolve upon different persons, equity would prevent a merger, although the reversion had in fact been conveyed to the person possessed of the term. (Upon merger in equity, see Challis, R. P. 73 *et seq.*)

It has been suggested (Wolstenholme & Turner, Settled Land Act, 2nd ed. p. 38) that where the trusts of the settled leaseholds are such as will correspond with the uses of freeholds, also comprised in the settlement, "as nearly as the different tenure and rules of law will allow," the trust will best be complied with by not keeping the term on foot. This suggestion is intrinsically reasonable; but it may be advisable in future settlements comprising leaseholds to make express provision for this purpose.

The Act gives no express authority to the trustees or the Court to adjust the rights of parties on the *purchase* of a reversion. As to sales of reversions, see s. 34, p. 251, *post*.

(vii.) In purchase of land in fee simple, or of

S.L.A. 1882, Sect. 21.

copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

On a purchase of leaseholds, it is conceived that the tenant for life will be entitled to the whole income. This power to convert a freehold settled estate into a leasehold settled estate may operate very unfairly to the prejudice of the remainderman, without in the least tending to the benefit of the public. Though it is not opposed to the usual policy of settlements, this affords no ground for needlessly thrusting it into all settlements, even against the settlor's declared wish.

Where money is authorized by an Act of Parliament or settlement to be laid out in the purchase of land, it has been held in a long series of cases that such money may be applied in the erection of new buildings (see *Re Barrington's Settlement*, 1 J. & H. 142; *Re Newman's Settled Estates*, L. R. 9 Ch. 681; *Drake* v. *Trefusis*, L. R. 10 Ch. 364; *Re Speer's Trusts*, 3 Ch. D. 262; *Re Lytton's Settled Estates*, W. N. 1884, p. 193); but not in permanent improvements (*Drake* v. *Trefusis*, *supra*). In *Re Newman's Settled Estates*, *supra*, Mellish, L. J., though consenting to follow the course of authority, doubted its propriety. The elaborate directions of the present Act, which include powers to erect certain kinds of buildings (s. 25, at p. 237, *post*), seem to make any such further extension inappropriate. The Settled Estates Act, 1877, and (as regards the building or improvement of a mansion house) the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56), and the Limited Owners' Residences Act (1870) Amendment Act, 1871 (34 & 35 Vict. c. 84), will be available for such purposes. The two last-mentioned Acts are to be construed as one with the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). Sect. 3 of 34 & 35 Vict. c. 84, defines improvements of this nature, and is as follows:—

34 & 35 Vict. c. 84, s. 3.

"The erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion house and such appurtenances as aforesaid, and the improvement of and addition to any mansion house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature, provided that every such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, shall be improvements within the meaning of the 'Improvement of

Land Act, 1864,' and may, subject to the provisions of the recited Act, be charged upon such estate." S.L.A. 1882, Sect. 21.

In 33 & 34 Vict. c. 56, s. 4, two years' rental of the estate is prescribed as the limit to what may be spent for these purposes. "Rental" means the rental of the whole estate comprised in the settlement. (*Re Dunn's Settled Estates*, W. N. 1877, p. 39.)

In *Frith* v. *Cameron*, L. R. 12 Eq. 169, trustees were, under the general jurisdiction of the Court, authorized to raise money by mortgage and employ it in re-building a mansion house upon a new site; the tenant in tail in remainder being an infant, the need for re-building being urgent, and proof being given that the result would be to increase the value of the whole property by at least as much as the cost. This jurisdiction should be restricted to what may be called "actual salvage" of an infant's property. (*Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 786.)

On the conveyance by limited owners of sites for places of religious worship and burial places, see the Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50).

In the case of capital money arising from land subject to a trust for sale, &c., which is made settled land by s. 63, p. 294, *post*, restrictions are imposed upon its investment in land. See sub-s. (2) (ii.) of that section.

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

Purchase-money of land sold which is in Court under the Lands Clauses Act remains unconverted. A tenant in tail thereof is not entitled to such money without executing a disentailing deed. (*Re Reynolds*, 3 Ch. D. 61.) The same rule applies with regard to the present Act. See s. 22, sub-s. (5), p. 232, *post*.

Only absolute owners, as distinguished from limited owners and owners having defeasible interests, can elect upon questions of conversion. (*Sisson* v. *Giles*, 3 De G. J. & S. 614.)

In the case of any woman married before the 1st January, 1883, and whose title accrued before that date, if the married woman, being absolutely entitled, should elect to take the money as personalty, it would, subject to any settlement or equity to a settlement, be payable to her husband. If the money should be in Court, her election must be testified by separate examination (*Standering* v. *Hall*, 11 Ch. D. 652; *Re Robins' Estate*, W. N. 1879, p. 95); unless the amount is under 200*l*. (*Wallace* v. *Greenwood*, 16 Ch. D. 362.)

S.L.A. 1882, Sect. 21.

The words "or empowered to give an absolute discharge," seem to incorporate the doctrine of *Re Hobson's Trusts*, 7 Ch. D. 708; namely, that money paid into Court (under the Lands Clauses Act) may be paid out to trustees of a settlement as being absolutely entitled; and to allow payment to the trustees, if they come within the definition of trustees for purposes of the Act. This power, however, is discretionary on the part of the Court. (See *Re Smith*, 40 Ch. D. 386.) If necessary, trustees will be appointed for the purposes of the Act, and the money will, at the request of the tenant for life, be ordered to be paid to them. (*Re Wright's Trusts*, 24 Ch. D. 662; *Re Harrop's Trusts*, *ibid.* 717.) See also, note on s. 32, at p. 249, *post*. The trustees of the settlement itself, though empowered to give receipts, cannot obtain the money without the consent of the tenant for life, because otherwise his option under s. 22, *post*, would be nugatory.

A payment into Court to the credit of a lunatic who is absolutely entitled, will not operate to effect a conversion, because the lunatic himself cannot elect. (*Re Barker*, 17 Ch. D. 241; *Re Freer, Freer* v. *Freer*, 22 Ch. D. 622.)

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

Costs may also, by direction of the Court, be paid out of money raised by mortgage. See s. 47, p. 271, *post*. And as to the Court's discretion, see s. 46, sub-s. (6), p. 270, *post*.

A tenant for life, an action against whom, undertaken for the purpose of restraining him from exercising his statutory powers, has been dismissed with costs, is entitled out of capital moneys to his extra costs of so much of the action as relates to his exercise of the powers. (*Re Llewellin, Llewellin* v. *Williams*, 37 Ch. D. 317.)

An intention to deal with certain portions of an estate will not enable a tenant for life to obtain, out of capital moneys, payment of the costs of making an elaborate survey of the whole estate. (*Re Eyton's Settled Estates*, W. N. 1888, p. 254.)

As to the form of order for payment of costs of sale, see *Re Rudd*, W. N. 1887, p. 251.

In *Re Llewellin, Llewellin* v. *Williams*, *supra*, a tenant for life was allowed part of the extra costs of an action of *Thomas* v. *Williams* (24 Ch. D. 558), which had been brought, prior to the passing of this Act, to restrain a sale, which was ultimately carried out under the powers of this Act.

It has been held that the costs of obtaining the consent of the tenant for life's assignee of his life estate, are not costs incidental to the exercise of his statutory powers, and ought not to be allowed out of the capital moneys produced by a sale. (*Cardigan* v. *Curzon-Howe*, No. 2, 40 Ch. D. 338.) An appeal has been brought from this decision. See also as to costs of mortgagees of a life estate, *Sebright* v. *Thornton*, W. N. 1885, p. 176, and note on s. 53, at p. 281, *post*.

S.L.A. 1882, Sect. 21.

As to costs of applications under this Act, where the estate is being administered by the Court, see *Colyer* v. *Ferguson*, 82 L. T. Newsp. 138.

If trustees, instead of appearing as parties assisting the Court by checking the party making an application as to improvements under s. 25, simply concur in the application, they may fail to obtain their costs out of the estate. (See *Re Broadwater Estate*, 33 W. R. 738.)

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

The settlor may increase, but cannot diminish, these modes of applying capital.

The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29, clause 6, provides that capital money may be applied for certain purposes of that Act. The section and the first schedule therein referred to are printed, p. 412, *post*.

As to the exercise of concurrent powers, see s. 56, and note thereon, at p. 283, *post*. If the money has been raised by the exercise of a power conferred by the settlement, it may be laid out without the formalities prescribed by s. 26, p. 239, *post;* but not if it has been raised by the exercise of a statutory power.

Sect. 22. Regulations respecting investment, devolution, and income of securities, &c.

22.—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

For provisions relating to the payment of money into Court under this section, see the S. L. Act Rules, 1882, rr. 10—14, p. 376, *post*.

When the tenant for life has once exercised his option, and the money has been paid to the trustees, it does not appear that, even at his request, they can pay the money into Court under this section.

If the tenant for life consents to its payment into Court, it must remain there, and cannot be paid out to the trustees on his petition. (*Cookes* v. *Cookes*, 34 Ch. D. 498.)

Here "trustees of the settlement" appears to mean trustees for purposes of the Act.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-

S.L.A. 1882, Sect. 22.

mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

Although the trustees are bound to obey the directions of the tenant for life, it seems that they must see the money applied in some way prescribed by the Act. Sects. 41 and 42, p. 263 and p. 264, *post*, do not excuse them from this duty. As to how far they must see to the carrying out of authorized improvements, see s. 26, p. 239, *post*.

If under the settlement the trustees have power to effect repairs and improvements out of income, this will not of itself prevent the application of capital moneys in payment for authorized improvements, or interfere with the right of the tenant for life to direct such application. (*Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's Estate*, 56 L. T. 484.)

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life, or of the trustees.

See s. 46, sub-s. (3), p. 269, *post*.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

This seems to mean the tenant for life for the time being. If he should be an infant, it seems that the trustees may consent on his behalf, by virtue of s. 60, p. 291, *post*, although giving such consent is not, strictly speaking, exercising a power. See note on s. 2, sub-s. (5), p. 186, *ante*.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

See note on s. 21, sub-s. (ix.), p. 229, *ante*.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement. S.L.A. 1882, Sect. 22.

This enactment seems to be applicable only to the case of capital money arising by a sale of land. The income of capital money arising by other means will probably be held to go in the same way.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms IX., X., XI., p. 381, *post.*

23. Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. Sect. 23. Investment in land in England.

See note on s. 4, sub-s. (8), p. 197, *ante.*

It is stated (32 Sol. Journ. at p. 625), that in an unreported case (*Re Strousberg*) before Bacon, V.-C., in February, 1886, the learned judge held that, notwithstanding this sub-section, capital money might be expended upon the improvement of land in a foreign country settled by an English settlement. The correctness of this decision, if it is accurately stated, seems to be open to doubt.

24.—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section. Sect. 24. Settlement of land purchased, taken in exchange, &c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

"Freehold land" properly includes all freeholds, whether of inheritance or not. The Act, however, does not expressly authorize the purchase of any freehold except a fee simple.

The question sometimes arises, whether trusts created by reference to existing trusts create duplicate charges. See *Hindle* v. *Taylor*, 20 Beav. 109; 5 De G. M. & G. 577; *Baskett* v. *Lodge*, 23 Beav. 138; *Baker* v. *Richards*, 27 Beav. 320. This is prevented by the last words of this sub-section.

S.L.A. 1882, Sect. 24.

The freeholds will be settled upon trusts, or by succession of legal estates, according as the one or the other plan was followed in the original settlement.

Estates *pur autre vie*, sometimes styled "leaseholds for life," are freeholds. If settled by reference to the limitations in strict settlement of freeholds of inheritance, the whole estate does not vest absolutely in a quasi-tenant in tail so created, so as to destroy the succession under the quasi-entail; though he may convey the whole estate by any assurance *inter vivos*, without observing certain formalities required by a disentailing assurance. (See Challis, R. P. 291, 292.)

Renewable leaseholds for lives are common in some parts of the country, especially in Ireland; and it might easily occur in practice that a settlement might authorize moneys produced by the exercise of a power of sale to be applied in the purchase of this kind of freeholds; in which case capital moneys arising under the Act might be invested in like manner by virtue of s. 21, sub-s. (xi.), p. 231, *ante*.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

Copyholds are directed to be vested in the trustees upon trusts, &c., in order to avoid questions as to the possibility of actually conveying them to the uses, &c., declared of the freeholds. In the case of freeholds this difficulty does not arise.

Since the Statute of Uses does not extend to copyholds, successive legal estates in copyholds can only be raised by surrender to uses, not by merely declaring uses upon a conveyance. The trustees must for their own protection see that the conveyance is perfected by an actual surrender, which should be made to themselves.

"Leasehold land" seems in this section to mean "terms of years." In loose phraseology, under the name "leaseholds for lives," it is sometimes used to include estates *pur autre vie;* but these, as being beyond question freehold, are included in sub-s. 2, *supra*. If terms of years are settled by reference to the limitations in a strict settlement of freeholds of inheritance, or by

reference to similar limitations by way of trusts, the whole term vests absolutely in the first tenant in tail of the lands whose estate becomes a vested interest. (See note on the Conv. Act, 1881, s. 65, sub-s. 5, p. 147, *ante*.) This result is prevented by the second clause of the present sub-section, but in regard only to tenants in tail by purchase, not by descent.

S.L.A. 1882, Sect. 24.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

With this and the two following sub-sections compare s. 5, p. 197, *ante*.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

By virtue of the Conv. Act, 1881, s. 62, p. 140, *ante*, it will be possible to limit easements, &c., purchased for the benefit of the settlement, so that they may accompany strictly settled freeholds of inheritance.

VII.—Improvements.

Improvements with Capital Trust Money.

Sect. 25. Description of improvements authorized by Act.

25. Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the

S.L.A. 1882, Sect. 25.

following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

As to the preliminaries and conditions subject to which improvements may be made, see next section.

As to the power of the tenant for life to concur with adjoining owners and others, see s. 27, p. 241, *post*.

As to the duties and liabilities of the tenant for life in regard to repairs, see ss. 28, 29, pp. 241, 244, *post*.

Where a trustee had spent money in an improvement which the Court had no power to authorize, he was nevertheless allowed to be recouped out of a fund in Court in an administration action, it being admitted that the outlay was beneficial to the estate. (*Jesse* v. *Lloyd*, W. N. 1883, p. 88; 48 L. T. 656.) This case purported to follow, but in fact exceeded, the decision in *Vyse* v. *Foster*, L. R. 7 H. L. 318.

If capital money derived from the sale of freeholds should be employed in paying for improvements effected upon leaseholds, the result may be very injurious to the interests of remaindermen. The fiduciary position of the tenant for life seems to make it improper for him to be a party to such expenditure, unless under very special circumstances. At the same time, there seems to be no obstacle thereto, if the trustees are willing to approve of the scheme by virtue of s. 26, sub-s. (2), p. 240, *post*. But it may be doubted whether the language of s. 42, p. 264, *post*, which speaks of *giving consents*, would afford them any protection if they should improperly give their *approval*.

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

This includes improvements in the system of drainage to a mansion house: see *Re Houghton Estate*, 30 Ch. D. 102.

(ii.) Irrigation; warping:

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; redivision of fields:

(vii.) Reclamation; dry warping: S.L.A. 1882, Sect. 25.
(viii.) Farm roads; private roads; roads or streets in villages or towns:

In an unreported case in chambers, *Re Wyvill's Denton Estates*, heard 7th July, 1887, before North, J., a bridge over a stream was permitted to be made under this section. Certain farm roads were at the same time made in connection with the bridge; but the cost of the bridge was the principal item in the expenditure.

(ix.) Clearing; trenching; planting:
(x.) Cottages for labourers, farm-servants, and artizans, employed on the settled land or not:
(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:

It was held by the C. A. in *Re Broadwater Estate*, 33 W. R. 738, that, though silos might be buildings for farm purposes, the employment of capital money upon the formation of them could not be sanctioned, upon the ground that they were in the nature of an experiment; but the attention of the Court does not appear to have been called to the Agricultural Holdings (England) Act, 46 & 47 Vict. c. 61, s. 29, p. 412, *post*.

The Housing of the Working Classes Act, 1885, 48 & 49 Vict. c. 72, s. 11, sub-s. (1), enacts as follows:—

"11.—(1.) The Settled Land Act, 1882, shall be amended as follows:—

* * * * *

(b) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans whether employed on the settled land or not, include any dwellings available for the working classes, the building of which, in the opinion of the Court is not injurious to the estate."

(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agri-

S.L.A. 1882, Sect. 25.

cultural, manufacturing, or other purposes, or for domestic or other consumption:

This includes an improvement in the water supply to a mansion house: see *Re Houghton Estate*, 30 Ch. D. 102.

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market-places:

(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land:

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid:

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 31, the making of works for supplying sewage to lands for agricultural purposes, is to be deemed an improvement of land authorized by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). This does not seem to be included among the improvements authorized by the present section.

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines:

(xx.) Reconstruction, enlargement, or improvement of any of those works.

The purposes enumerated by this section include, with considerable additions, all the improvements authorized by the Improvement of Land Act, 1864, s. 9; as to which see s. 30, p. 245, *post*. Capital moneys may also be employed in any of the improvements mentioned in Sched. I., Parts 1 and 2, to the Agricultural Holdings (England) Act, 1883; see p. 413, *post*.

S.L.A. 1882, Sect. 25.

Before the enactment of the S. L. Act, 1887, it had been held that this and the next following section were prospective only, and could not be used for the purpose of relieving a tenant for life from liabilities already incurred. (*Re Knatchbull's Settled Estate*, 29 Ch. D. 588.) But now by the S. L. Act, 1887, s. 1, p. 310, *post*, such improvements, when of a kind authorized by the present Act, if executed before the Act, may be paid for out of capital money. See, however, *Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123, there cited.

As to the building and improving of mansion houses, see note on s. 21, sub-s. (vii.), at p. 228, *ante*.

The unrepealed portions of 8 & 9 Vict. c. 56, enabling money raised for drainage works to be charged on land, seem to be rendered obsolete by the Improvement of Land Act, 1864.

As to raising money by the creation of a rentcharge for effecting improvements, see note on s. 18, at p. 217, *ante*.

It has been held that this section authorizes the building of stables to a mansion house; also the building of an agent's house. See *Re Houghton Estate*, 30 Ch. D. 102.

As to the distinction between improvements and repairs, with regard to the application of capital money, see *Clarke* v. *Thornton*, 35 Ch. D. 307.

Sect. 26.

Approval by Land Commissioners of scheme for improvement and payment thereon.

[*This marginal note is a survival from an inchoate stage of the Act. See note on s. 28, sub-s.* (1), *post.*]

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Some difficulty may arise in cases where the "trustees of the settlement" are not identical with the "trustees for purposes of this Act." See s. 2, sub-s. (8), p. 188, *ante*. In such a case, if the approval of both cannot be obtained, it will be the safest plan to apply to the Court.

Since no special indemnity is given to the trustees by ss. 41, 42, pp. 263, 264, *post*, in respect of moneys applied by them under this section, it would seem that they are bound by the ordinary rule concerning the payment of capital money by trustees. They cannot safely make the tenant for life their agent for the purpose of making the payment.

The section seems to authorize payments on account from time to time, on separate certificates.

Probably the trustees may safely pay the expenses preliminary to any scheme immediately on its approval; see s. 21, sub-s. (x.), p. 230, *ante*. If the tenant for life should fail to obtain for a scheme the approval either of the trustees or of the Court, the trustees cannot safely pay such expenses without an order of the Court, which might be made under a somewhat liberal interpretation of s. 44, and s. 46, sub-s. (6), pp. 266, 270, *post*.

S.L.A. 1882, Sect. 26.

If the tenant for life executes an improvement without first submitting a scheme and complying with the requirements of this section, he cannot afterwards obtain payment of the expenses out of capital moneys. (*Re Hotchkin's Settled Estates*, 35 Ch. D. 41.) But unforeseen and reasonable extensions of or additions to a properly-approved scheme may be paid for out of capital moneys. (*Re Bulwer Lytton's Will*, 38 Ch. D. 20.)

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

If the tenant for life is dissatisfied with any refusal of the trustees to approve a scheme, he may apply to the Court under s. 44, p. 266, *post*. This seems to be implied by sub-s. (2) (ii.), *infra*.

As to the possible liability of trustees for "approving" an improvident scheme, see note on s. 25, at p. 236, *ante*.

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

Upon the constitution and functions of the Land Commissioners, see s. 48, p. 272, *post*. Applications to them will be governed by the procedure under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114); *ibid.* sub-s. (6).

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

The remarkable phrase, "able practical surveyor," appears to have been suggested by the Lands Clauses Act, 1845, 8 Vict. c. 18, s. 59.

(iii.) An order of the Court directing or autho-

rizing the trustees to so apply a specified portion of the capital money. S.L.A. 1882, Sect. 26.

It would seem that applications to the Court under this section should be made by the tenant for life, not by the trustees. This view is confirmed by the forms prescribed to be used for the purpose; see Appendix to the S. L. Act Rules, 1882, Nos. XIII., XV., XVI., pp. 382, 383, *post*. It is doubtful whether s. 44, p. 266, *post*, authorizes the trustees to take the initiative.

An order may be made subject to a proper contract and specification being afterwards obtained and approved by the judge in chambers.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

See note on s. 21, sub-s. (xi.), p. 231, *ante*.

For forms applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms XII.—XVI., pp. 382, 383, *post*.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this Act, or in contributing to the cost thereof. Sect. 27. Concurrence in improvements.

As to concurrence with owners of undivided shares, which extends to "any purpose of the Act," see s. 19, p. 217, *ante*. The present section, which extends to concurrence with adjacent owners and other persons, as well as owners of undivided shares, is restricted in its scope to the execution of authorized improvements. As to concurrence with adjoining owners for other purposes, see note on s. 19, *ante*.

The Act contains no express provision for apportionment of the expenses of joint improvements, but this seems to be necessarily implied in the provisions for concurrence in executing them.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, Sect. 28. Obligation on tenant for life and

S.L.A. 1882, Sect. 28.

successors to maintain, insure, &c.

shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

From s. 26, p. 239, *ante*, it appears that improvements might be executed and paid for out of capital, without the Land Commissioners having any opportunity to prescribe any such "period" for maintenance and repair, as in this section mentioned.

The question arises, whether the Commissioners have a separate jurisdiction, apart from the granting of the certificate mentioned in s. 26, sub-s. (2), (i.), to grant other certificates, upon the application or suggestion of any person interested under the settlement, in order to give effect to the requirements of the present section.

In cases coming under s. 26, sub-s. (2), (iii.), the Court will no doubt only make the order therein mentioned subject to such terms as to maintenance and repair as it thinks proper; and probably for that purpose will require a separate certificate to be obtained from the Commissioners.

It is also possible that, in cases coming under s. 26, sub-s. (2), (ii.), the commissioners will be able to prescribe a period for maintenance and repair, as a condition of their approving the competent engineer or the able practical surveyor therein mentioned.

If, from any cause, no period should in fact be prescribed by the commissioners, it does not appear that the tenant for life is placed under any express obligation to maintain or repair. It may, however, be suggested that since he is, by s. 53, p. 279, *post*, put in the position of a trustee in the exercise of his statutory power, it will be part of his duty himself to apply for and procure a certificate in that behalf. Otherwise he may perhaps not be safe, during any part of his tenancy, in omitting to maintain and repair.

In the absence of special provision in the settlement, the tenant for life, as between himself and the remainderman, is not bound to insure or to keep insured buildings, originally comprised in the settlement, he being under no obligation to repair involuntary damage incurred by *vis major*. (Co. Litt. 53 b.)

As to liability for permissive waste, see the notes to *Greene* v. *Cole*, 2 Wms. Saund. 644; *Powys* v. *Blagrave*, 4 De G. M. & G. 448.

A contract of fire insurance is only a contract of indemnity. (*Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Rayner* v. *Preston*, 18 Ch. D. 1.) In *Warwicker* v. *Bretnall*, 23 Ch. D. 188, it was held, that an infant tenant in tail, out of whose income the

premiums had been paid, was not bound to reinstate the buildings destroyed; and the opinion expressed in 3 Dav. Prec. 3rd ed. p. 290, *note*, that, although the tenant for life may not be bound to insure, yet, if he insures, he is bound to lay out the insurance money in rebuilding, was questioned by Chitty, J., as lacking authority. S.L.A. 1882, Sect. 28.

Of course, money received from insurances effected under the present section must be laid out in reinstating the damaged premises.

See further, as to insurance in general, note on the Conv. Act, 1881, s. 23, sub-s. (3), p. 77, *ante*.

Under the S. L. Act, 1887, s. 2, the improvements referred to in s. 1 are to be deemed to be improvements within the present section: see p. 311, *post*.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

Planting is authorized by s. 25, sub-s. (ix.), p. 237, *ante*.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the

S.L.A. 1882, Sect. 28.

tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

The phrase "tenant for life" seems in this section to be used in two different senses. Otherwise an action would lie against the tenant for life by reason of the default of "any of his successors as aforesaid." The measure of damages seems to be the amount required to reinstate the dilapidated "improvements." If successive life estates exist under the settlement, and the incoming tenant for life is himself bound to maintain, &c., he must either expend the money in fulfilling the obligation, or must otherwise treat it as capital money.

Execution and Repair of Improvements.

Sect. 29. Protection as regards waste in execution and repair of improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

The emphatic words of this section seem to be, *without impeachment of waste*, &c., and the intention of the section seems to be restricted to effecting this object. It has been suggested by Messrs. Wolstenholme & Turner (Settled Land Act, 2nd ed. p. 47), that the Act enables the tenant for life to enter as against his own tenant, without any provision in that behalf being contained in the lease. But it is incredible that the Act meant to enable limited owners to enter upon, and improve, land in the occupation of lessees, or to enter for the purpose of executing improvements for the benefit only of adjoining land, when they would not be able so to do if they were absolute owners.

The apparently corresponding provisions in the Improvement

of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 32—34, do not authorize the person making the improvements to commit any trespass which he may think proper, but only, with the consent of the Inclosure Commissioners, to take proceedings under the Drainage Acts to obtain exceptional authority for invading the rights of third persons. S.L.A. 1882, Sect. 29.

The general effect of the present section is to enable the internal resources of the settled land to be utilized for the purpose of carrying out authorized improvements.

Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorized by this Act. Sect. 30. Extension of 27 & 28 Vict. c. 114, s. 9.

The 27 & 28 Vict. c. 114, s. 9, is as follows:—

"**9.** By 'the improvement of land' shall herein be meant all or any of the following matters: 27 & 28 Vict. c. 114, s. 9.

1. The drainage of land, and the straitening [*sic*], widening, deepening, or otherwise improving the drains, streams and water-courses of any kind:
2. The irrigation and warping of land:
3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner:
4. The inclosing of lands, and the straitening [*sic*] of fences and re-division of fields:
5. The reclamation of land, including all operations necessary thereto:
6. The making of permanent farm roads and permanent tramways and railways and navigable canals for all purposes connected with the improvement of the estate:
7. The clearing of land:
8. The erection of labourers' cottages, farm-houses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farm-houses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature:
9. Planting for shelter:
10. The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, water-courses, bridges, weirs, sluices, floodgates, or hatches, which will increase the value of any land for agricultural purposes:
11. The construction or improvement of jetties or landing

S.L.A. 1882, Sect. 30.

places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes; provided that the Commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof:

12. The execution of all such works as in the judgment of the Commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof."

VIII.—Contracts.

Sect. 31. Power for tenant for life to enter into contracts.

31.—(1.) A tenant for life—

(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

This does not seem to authorize the insertion in a lease of an option to the lessee to purchase. Such options are *ultra vires* in the case of persons exercising powers in a fiduciary capacity; as to which, see s. 53, p. 279, *post.* (*Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.) If it is desired that such a power should be exerciseable, it must be expressly given by the settlement, as is sometimes done. (See *Hallett to Martin*, 24 Ch. D. 624.) The section does not seem to authorize the insertion of a covenant for renewal. Compare *Re Farnell's Settled Estates*, 33 Ch. D. 599.

(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

For provisions as to leases, see sects. 6—12, and notes thereon, pp. 198—209, *ante.*

A contract by a tenant for life to exercise a power of leasing vested in him by the settlement, is binding upon the remaindermen, independently of the present provision. (*Shannon* v. *Bradstreet*, 1 Scho. & Lef. 52.)

S.L.A. 1882, Sect. 31.

It is conceived that the restriction as to time imposed upon leases by s. 7, sub-s. (1), p. 200, *ante*, must be extended to contracts for leases. But this does not seem to apply to cases of accidental delay, prolonged beyond the period of twelve months, arising out of difficulties as to title, power to give possession, litigation, or otherwise.

(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

As to the acceptance of surrenders by the tenant for life, see s. 13, p. 209, *ante*.

(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

As to the time within which a contract may be enforced, see Fry on Specific Performance, Part III., ch. xxv. (2nd ed. pp. 462 *et seq.*).

Since the contract "enures for" the benefit of the settled land, it may be contended that a forfeited deposit is capital money. Where a power of sale, with consent of the tenant for life, was vested in trustees, it has been held that a forfeited deposit did not go to the tenant for life. (*Shrewsbury* v. *Shrewsbury*, 18 Jur. 397; cited, Dart, V. & P. ch. v. sect. iv.; 6th ed., p. 224.)

S.L.A. 1882, Sect. 31.

It is conceived that if the successor in title is an infant, the trustees may complete, vary, or rescind, a contract on his behalf under sects. 59, 60, pp. 290, 291, *post*. This conclusion seems to be supported by the principles laid down in *Davis* v. *Harford*, 22 Ch. D. 128.

As to contracts by a tenant in tail, see note on s. 58, sub-s. (1), (i.), p. 285, *post*.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

The tenant for life will do well, before commencing or defending an action, to apply for directions under this sub-section, for the purpose (*inter alia*) of procuring the payment of costs, if necessary, out of capital. In proper cases costs will, if necessary, be ordered to be raised by mortgage under s. 47, p. 271, *post*.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

Compare the Conv. Act, 1882, s. 4, and note thereon, at p. 170, *ante*. The present section perhaps refers to s. 45, p. 267, *post*, and may prevent all danger to purchasers for value arising from any default in the giving of such notices as therein mentioned; also any danger which might arise from the existence of a concealed contract prior to that under which the lease was granted.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XVII., p. 383, *post*.

IX.—Miscellaneous Provisions.

Sect. 32. Application of money in Court under Lands Clauses and other Acts. 8 & 9 Vict. c. 18. 23 & 24 Vict. c. 106. 32 & 33 Vict. c. 18. 40 & 41 Vict. c. 18.

32. Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act,

on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court. S.L.A. 1882, Sect. 32.

Money paid into Court under the Lands Clauses Act may be paid out to the trustees at the request of the tenant for life. (*Re Duke of Rutland's Settlement*, W. N. 1883, p. 140; 31 W. R. 947. See also *Re Wright's Trusts*, 24 Ch. D. 662; *Re Rathmines Drainage Act*, 15 L. R. Ir. 576; *Re Byron's Will, &c.*, 22 L. J. Notes, 175.)

Under this section a large sum of money, which had been paid into Court under a private Act, was ordered to be paid out to trustees appointed for purposes of the present Act, under s. 38, p. 259, *post*, and the judge expressed the opinion that notice should be given by them to the tenant in tail in remainder of all proposed investments or applications of such money; but that there was no jurisdiction to impose any such restriction as a condition of the payment out. (*Re Bolton Estates Act*, W. N. 1885, p. 90; 52 L. T. 728.) In this case the "tenant for life" appears to have been a tenant in tail who was restrained from barring the entail by statute; as to which see s. 58, sub-s. (1) (i.), p. 285, *post*.

The purchase-money of lands belonging to a charity and taken by a public body, having been paid into Court under the Lands Clauses Act, has been held to come within this section for purposes of investment. (*Re Byron's Charity*, 23 Ch. D. 171.)

A public body having taken settled land and paid the purchase-money into Court, it was held that they must pay all the costs of an *interim* investment under the present Act, though the Act by virtue of which they took the land only provided for *interim* investment in Government securities. (*Re Hanbury's Trusts*, W. N. 1883, p. 116; 31 W. R. 784.)

As to whether money in Court, being the proceeds of the sale of realty in a partition action (under the Partition Act, 1868) and belonging to infants, is money liable to be re-invested in land by virtue of sects. 23—25 of the Settled Estates Act, 1856 (re-enacted by the Settled Estates Act, 1877, ss. 34—36), which are incorporated with the Partition Act, 1868, see *Mordaunt* v. *Benwell*, 19 Ch. D. 302.

This section does not, of course, authorize for the purposes of ordinary settlements of personalty the investments authorized by the present Act, or make them proper trustees' investments for any purpose except the purposes of this Act. (See *Fox* v. *Dolby*, W. N. 1883, p. 29.)

As to the separate examination of married women under the Settled Estates Act, s. 50, see *Re Arabin's Trusts*, W. N. 1885, p. 90; 52 L. T. 728. See also note on the M. W. P. Act, 1882, s. 1, sub-s. (2), p. 330, *post*, and cases there cited.

S.L.A. 1882, Sect. 32.

The Court may allow the costs of a petition for the payment out of Court and investment under this Act of money paid in under the Lands Clauses Act, notwithstanding the R. S. C. 1883, Ord. LV. r. 2 (7). (*Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541.)

Where a small portion of settled land, which was held by a lessee at a rent, was taken by a company under compulsory powers, and the lessee agreed to pay to the tenant for life the undiminished rent for the residue left in his hands, it was held that the tenant for life could not be allowed to make a profit on the transaction, and that the whole income of the company's purchase-money must be accumulated during the continuance of the lease. (*Re Griffith's Will*, 49 L. T. 161.) It would seem, from this extraordinary decision, which purports to follow, but is in fact easily distinguishable from, *Re Wilkes' Estate*, 16 Ch. D. 597, that whenever a lessee voluntarily consents to have his rent raised, the tenant for life is not entitled to the benefit of the increase.

Sect. 33. Application of money in hands of trustees under powers of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this Act.

The marginal note to this section is misleading.

It has been suggested, but apparently without sufficient reason, that the word "settlement" in this section has a more extensive meaning than in the interpretation clause (s. 2, sub-s. 1, p. 184, *ante*), and applies to a will, &c., of personalty, directed to be invested in the purchase of land (see *Mackenzie's Trusts*, 23 Ch. D. 750, and note on s. 21, at p. 221, *ante*); although such a will is not a settlement within the meaning of the interpretation clause.

"Liable to be laid out," must mean "directed to be laid out"; because otherwise every will, &c., which contains a power to invest trust funds in land, would be a settlement within the meaning of the present Act.

The trustees must give effect to the "option" of the tenant for life. Compare s. 22, sub-s. (2), p. 231, *ante*. It was held in an Irish case that a fund, which by the settlement is liable to be invested in land, to be settled in strict settlement, but which has been brought into Court in an administration action, is not within this section. (*Burke* v. *Gore*, 13 L. R. Ir. 367.) But in *Re Maberly, Maberly* v. *Maberly*, 33 Ch. D. 455, V.-C. Bacon held that trustees might defer such investment in land, and meanwhile invest the money under this section.

S.L.A. 1882, Sect. 34.

Application of money paid for lease or reversion.

34. Where capital money arising under this Act is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

The object of this section is to prevent a sale made under the Act of a limited interest, or an interest not in possession, from operating to the prejudice of any party interested under the settlement, whether tenant for life or remainderman. The words which direct apportionment follow, with some verbal improvements, the corresponding words of the Settled Estates Act, 1877, s. 37, which are identical with the corresponding words of the Lands Clauses Consolidation Act, 1845, s. 74. It is conceived that cases under those sections will form precedents for the interpretation of this. (This conclusion seems to have been adopted in *Cottrell* v. *Cottrell*, 28 Ch. D. 628.) The Partition Act, 1868 (31 & 32 Vict. c. 40), does not contain any similar provision. As to the effect of this omission, see *Langmead* v. *Cockerton*, W. N. 1877, p. 43.

Under the former Acts, the discretion as to apportionment was exerciseable only by the Court.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XVIII., p. 384, *post*.

I. As to Leaseholds.

1. Where leaseholds were taken under the compulsory powers conferred by the Lands Clauses Act, it was held that, although the income of the investments representing the purchase-money exceeded the rents of the leaseholds, the tenant for life was entitled to an annuity which would exhaust the whole fund in the same number of years as the leaseholds had to run. (*Askew* v. *Woodhead*, 14 Ch. D. 27, which was followed in *Re Hunt's Estate*, W. N. 1884, p. 181.) Where leaseholds were sold under the Settled Estates Act, and the tenant for life suffered by reason of the sale a diminution of income, the Court directed a calculation to be obtained from an actuary of the half-yearly

S.L.A. 1882, Sect. 34.

sums which would be produced for the residue of the term by the proceeds of sale, taking interest at £3 per cent., so as to exhaust the proceeds of sale at the end of the term; and ordered that in each half-year the dividends on the investments then remaining should be paid to the tenant for life, and so much of the investments should be transferred to him as, with the cash dividend, would make up the half-yearly sum so to be ascertained: the residue of the fund, if any, at the expiration of the life interest to go to the persons absolutely entitled in remainder. (*Re Walsh's Trusts*, 7 L. R. Ir. 554.)

2. Where leaseholds are renewable, and the settlor intended them to be perpetually renewed, the effect of a compulsory sale is only to substitute one perpetuity for another; and the purchase-money will be invested as capital, and only the annual income paid to the tenant for life. (*Re Wood's Estate*, L. R. 10 Eq. 572; *Hollier* v. *Burne*, L. R. 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327.)

3. And the same rule holds good when the leaseholds are not in fact renewable, but the settlor expected that they would be renewed and contemplated their perpetual renewal; though, in fact, renewal is refused. (*Re Barber's Settled Estates*, 18 Ch. D. 624. See, also, *Re Lord Ranelagh's Will*, 26 Ch. D. 590.)

As to the destination of a fund intended for the renewal of leaseholds, of which renewal was in fact refused, see *Gould* v. *Tripp*, W. N. 1883, p. 72.

II. As to Reversions.

1. Where the rent was only nominal, the whole purchase-money was directed to be invested and accumulated during the term. (*Ex parte Rector of Lambeth*, 4 Railw. Ca. 231.)

2. Where the rent, not being nominal, was less than the dividends on the invested purchase-money, the tenant for life received an amount equal to the rent, and the surplus was accumulated. Also, at the time when any lease would have determined, the tenant for life became thenceforth entitled to a proportionate share of the income accruing upon the accumulations. (*Re Wilkes' Estate*, 16 Ch. D. 597; which see, for form of order, at p. 602. See, also, *Cottrell* v. *Cottrell*, 28 Ch. D. 628.)

3. It is conceived that, if the rent should be less than the dividends, the tenant for life would in general be entitled to no more than the dividends. But cases might arise in which this principle might reasonably be modified. For example, if the property should be let at a rent greater than a rack-rent (which sometimes happens by the depreciation of a neighbourhood), so that an element in the valuation would be the lessee's liability to pay an excessive rent during the residue of a term, it would be reasonable, and in accordance with the apparent intent of this section, that the tenant for life should be allowed some advantage to compensate his loss from the conversion. This might be effected by investing the amount due to that particular element in the valuation in the purchase of an annuity to continue during as many years as the term had to run, and permitting the tenant for life, so long as he lived, to receive the annuity.

Or a proportionate allowance might be made out of the capital to the tenant for life, such as would, in the same number of years as the term had to run, exhaust the amount due to the particular element above mentioned. S.L.A. 1882, Sect. 34.

A legal estate for life may by will, but not by deed, be created out of a term of years. See note on the Conv. Act, 1881, s. 65, sub-s. (2), at p. 145, *ante*. Such a bequest would be specific, and would, therefore, imply no duty to convert. (*Vaughan* v. *Buck*, 1 Ph. 75; *Hubbard* v. *Young*, 10 Beav. 203; *Mills* v. *Brown*, 21 Beav. 1.)

As to the service of notices in applications to the Court under this section, see the S. L. Act Rules, 1882, r. 4, p. 375, *post*.

Sect. 35. Cutting and sale of timber, and part of proceeds to be set aside.

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

Timber planted as an improvement under the provisions of this Act may not be cut down except in proper thinning; see s. 28, sub-s. (2), p. 243, *ante*.

If land is sold with timber which the tenant for life had under the settlement power to cut, but which he did not in fact cut, he will not be allowed its value out of the purchase-money. (*Re Llewellin, Llewellin* v. *Williams*, 37 Ch. D. 317.)

At common law a tenant for life is entitled to cut timber for his own use and benefit only so far as may be necessary to furnish reasonable house-bote, plough-bote, and hay-bote. (Co. Litt. 41 b.) If expressly made not impeachable for waste, he may cut ripe timber; which, if cut during the continuance of his tenancy, belongs to him. (*Lewis Bowles's Case*, 11 Rep. 79; see the 7th resolution at p. 82 b.) But he would be restrained in equity from cutting timber planted or left standing for shelter or ornament. (*Rolt and Lord Somerville*, 2 Eq. Ca. Ab. 759; and see Seton, 4th ed. 191, 192; Tu. L. C. 3rd ed. 115; 1 Wh. & Tu. L. C. 5th ed. 751; and the cases there cited.) It seems that such ornamental timber might be properly thinned. (*Baker* v. *Sebright*, 13 Ch. D. 179, at p. 188.)

The question, whether the timber is deemed to come within the description of ornamental, depends solely upon the intention of the settlor. (*Coffin* v. *Coffin*, Jac. 70.) With this decision it is difficult to reconcile the unreported case there cited by Lord Eldon from Lord Hardwicke, in which a tenant for life was restrained from cutting down trees which he himself had planted.

Since a tenant for life, whether he is or is not otherwise unim-

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peachable for legal waste, is so impeachable in respect to ornamental timber, the language of this section seems to include ornamental timber, and to permit the tenant for life, whether impeachable for waste or not, to cut it, upon obtaining such consent or order as in the section mentioned.

Before this Act, the Court would not permit timber to be cut on the application of a tenant for life having no power of cutting, unless the timber either was itself actually deteriorating, or else was injuring other trees. Mere ripeness was not sufficient. (*Seagram* v. *Knight*, L. R. 2 Ch. 628; and the cases there cited at p. 631.) And when timber, whether ornamental or not, which the tenant for life could not himself cut, was properly cut with the leave of the Court, the proceeds were invested, and the income given to the successive owners of the estate, until the vesting in possession of the first estate of inheritance, the owner of which became thereupon entitled to the capital. (*Honywood* v. *Honywood*, L. R. 18 Eq. 306, at p. 311.)

As to the cutting of timber under the present section, the trustees seem, in the absence of fraud, to incur no liability for giving their consent; see s. 42, p. 264, *post*. And their consent seems to be conclusive.

If the interference of the Court is sought, either in default of trustees or on the refusal of the trustees to consent, it is conceived that under ordinary circumstances, if the timber is not decaying, the Court will let it stand; and that, even when it is decaying, the Court will not order it to be cut down if the remainderman should object. The latter's right to keep it standing seems superior to the right of the tenant for life to have it cut.

This power of cutting timber is not one requiring notice of its exercise to be given to the trustees under s. 45, p. 267, *post*, and S. L. Act, 1884, s. 5, p. 303, *post*. The rules do not provide that any application by the tenant for life shall be served upon the trustees; and therefore, if at the time of the application there are no trustees for purposes of the Act, it is not necessary to appoint such.

Cut timber immediately becomes personal assets, even if cut by an order of the Court in Lunacy (*Oxenden* v. *Lord Compton*, 2 Ves. 69); or by a bailiff acting without authority (*ibid.* at p. 74); there being no equity in favour of the heir as against the personal representatives. As to whether an express provision preserving the rights of the respective parties might be inserted in an order directing timber to be felled, see *Jones* v. *Green*, L. R. 5 Eq. 555, at p. 560, and *Re Barker*, 17 Ch. D. 241, at p. 245, both cited in *Re Freer*, *Freer* v. *Freer*, 22 Ch. D. 622, at p. 627. It seems to be the better opinion, that such a provision would have no effect.

As to the apportionment of the proceeds of windfalls, see *Swinburne* v. *Ainslie*, 30 Ch. D. 485; *Harrison* v. *Harrison*, 28 Ch. D. 220.

As to the power to cut timber for executing authorized improvements, see s. 29, p. 244, *ante*.

For forms of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Forms VI., VII., p. 380, *post*.

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Proceedings for protection or recovery of land settled or claimed as settled.

36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Compare the Settled Estates Act, 1877, s. 17, now repealed by s. 64, p. 299, *post*.

The costs, &c., here mentioned may be raised by mortgage under s. 47, p. 271, *post*.

It has been doubted whether, under the Settled Estates Act, 1877, costs could be paid out of capital to the tenant for life, unless he had applied to the Court before commencing the proceedings. (*Re Earl De la Warr's Estates*, 16 Ch. D. 587. See, however, *Re Twyford Abbey Settled Estates*, 30 W. R. 268; *S. C. nom. Re Willan's Settled Estates*, 45 L. T. 745.) The words of the present section, "taken or proposed to be taken," seem to remove this difficulty.

It is conceived that the intention of this section is to enable the costs of proceedings, taken for the purpose of recovering something which is alleged to be part of the corpus of the trust estate, to be paid out of corpus. The proceedings must be for the benefit of the estate generally, and not for the benefit of the tenant for life only. In *Re Earl of Aylesford's Settled Estates*, 32 Ch. D. 162, it was in effect decided by Bacon, V.-C., that if several persons claim to succeed as tenant for life to the estate, the successful claimant is entitled, under this section, to have his costs paid out of corpus. It is conceived that this decision cannot be supported. In that case, certain estates were limited in such a way that they would, as a matter of fact, devolve successively upon the persons successively succeeding to the Earldom of Aylesford; but the limitations, though in fact coincident, appear to have been quite distinct, and not made by reference. There could, therefore (apart from its intrinsic absurdity), be no foundation for the contention that the earldom was land subject to the settlement. Even if it had been, this section seems to contain nothing to relieve a successful claimant of the earldom from the obligation to pay his own costs before the Committee of Privileges, or to relieve a claimant of the estates from the obligation to pay the costs of establishing his own title as tenant for life. Much confusion seems to have been imported into this case by the citation of *Re Sir J. Rivett Carnac's Will*, 30 Ch. D. 136; as to which see note on s. 37, at p. 258, *post*. In that case it was held that a baronetcy might be "land," in such a sense as to enable chattels settled to devolve with it to be brought within the meaning of s. 37. But that case is hardly an

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authority for the proposition that either a baronetcy or an earldom can be "land subject to a settlement." And still less is it an authority for the proposition, that a tenant for life is entitled to have the costs of establishing or defending his title paid out of corpus.

As to the costs of an application to parliament, see *Stanford* v. *Roberts* (No. 2), 52 L. J. Ch. 50.

Sect. 37. Heirlooms.

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

As to the persons who will come within the definition of trustees for the purposes of this section, see note on s. 2, sub-s. (8), p. 188, *ante*.

Though the marginal note mentions only heirlooms, the section deals with something quite different. Heirlooms properly so called are not personal chattels, but particular chattels which, by the customs of particular places, attend the inheritance. Heirlooms proper are not devisable. (Co. Litt. 18 b, 185 b; 2 Bl. Com. 427.)

Intermediate between heirlooms proper and the chattels which are the subject of the present section, are certain chattels, such as ensigns of honour, which are in the nature of heirlooms, but differ therefrom in that their descent to the heir is not due to particular local custom. (*Frances* v. *Ley*, Cro. Jac. 366; *Earl of Northumberland's Case*, Owen, 124.)

Neither of the above-mentioned classes of chattels is within the present section, which refers to mere personal chattels, having no peculiar status in the eye of the law, arbitrarily settled upon trust to devolve with lands.

Personal chattels are sometimes settled, not so as to devolve

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with land, but directly upon trusts limited by analogy to the uses of a strict settlement, so far as the law permits. (See *Shelley* v. *Shelley*, L. R. 6 Eq. 540.) It has been doubted (but, according to V.-C. Wood, in *Shelley* v. *Shelley*, *supra*, at p. 546, the doubt has not been approved) whether things in gross (which differ *numero tantum*, *non specie*) such as money, not having, like family jewels, an individual value and interest, can be settled directly upon such trusts, apart from and without reference to a settlement of lands, or unless there is a trust to purchase lands. (See *Green* v. *Ekins*, 2 Atk. 473, at p. 476.) It is plain that this section refers only to chattels devolving with land. It may be noted that a gift of a leasehold house and chattels to a nobleman "and to his successors, and to be enjoyed with and to go with the title," will not suffice to create an executory trust, but the legatee will take absolutely. (*Re Johnston*, *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.)

On the vesting of chattels, which are subject to the same limitations as realty in strict settlement, see note on the Conv. Act, 1881, s. 65, sub-s. (5), p. 147, *ante*. The proper mode of settlement is to make them subject to the same limitations as the realty, with a proviso that they shall not vest absolutely in any person made tenant in tail by purchase of the realty, unless he shall attain twenty-one, but on the death of such person under twenty-one shall devolve as nearly as possible in the same manner as the realty.

The Court has assumed jurisdiction to order a separate sale of chattels so settled by will, during the minority of an infant tenant in tail of the lands, in order to pay off mortgages affecting the lands as part of the testator's estate, when satisfied that it would be for the benefit of all parties. (*Fane* v. *Fane*, 2 Ch. D. 711.) But such a sale cannot (apart from the present section) be ordered merely upon the ground of benefit to the parties, when there are no charges upon the testator's estate. (*D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.) In the last-cited case, Jessel, M. R., held that the Court could do nothing beyond sanctioning an application to parliament. The object of the present enactment is to save the expense of such applications; and the Court will probably hesitate to give leave for a sale except for the purpose of clearing off incumbrances, or in other cases where it would, previously to the Act, have sanctioned an application to parliament.

In *Re Lord John Thynne*, The Times, 7th July, 1884, an order was made for the sale of three Sèvres vases, valued at 8,000*l.*, for the purpose of paying off mortgages, the income of the settled estates having been seriously reduced.

It has been decided that capital money arising from the sale of these quasi-heirlooms may be applied in discharge of incumbrances under s. 21, sub-s. (ii.), p. 225, *ante;* see note thereon, and *Re Duke of Marlborough's Settlement*, there cited. Also, in payment for authorized improvements; see *Re Houghton Estate*, 30 Ch. D. 102. The possibility of such an employment of the proceeds of sale seems to be a matter for consideration when application is made for leave to sell under this section.

It has been held that trustees with a power of sale extending over the whole of the settled land, which therefore included the

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mansion house, by reference to which the chattels were settled, are trustees for purposes of the Act with reference to those chattels, so as to be able to give a discharge for the purchase-money. (*Constable* v. *Constable*, 32 Ch. D. 233.) It would not follow that, if the mansion house had been excepted from their power of sale, they would have been such trustees.

As chattels settled in this manner are not alienable by a tenant for life, no case of election will arise, as against the tenant for life, under a will which confers benefits upon him personally, but purports to dispose otherwise of the settled chattels. (*Re Lord Chesham, Cavendish* v. *Dacre*, 31 Ch. D. 466.)

For a statement of some of the considerations which will influence the Court in assenting to, or refusing to permit, a sale, see *Re Sir G. H. Beaumont*, 32 Sol. Journ. 504; 58 L. T. 916.

In *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136, a baronetcy had been limited to a grantee and the heirs male of his body, without naming any place in connection with the dignity; and the grantee by his will bequeathed a service of plate to trustees upon trust to permit the same to be enjoyed in the nature of an heirloom, so far as the rules of law and equity would permit, by such heir male of the testator's body, for the time being, as from time to time, under the said grant, should have inherited the testator's title of a baronet. The service of plate was suitable only to a great establishment, and the grandson of the testator, finding it quite unsuited to his means, and a mere source of useless expense for insurance, &c., desired to sell the plate. On an application to the Court for the purpose, made under this section, it was held by Chitty, J.—(1) That a baronetcy is an "incorporeal hereditament" within the meaning of s. 2, sub-s. (10), (i), p. 189, *ante;* (2) That a baronetcy is a tenement within the meaning of the statute *De Donis*, although no place is named in the grant in connection with the dignity; and, therefore, that a limitation to the heirs male of the grantee creates an estate tail, and not a conditional fee at the common law; and (3) That the baronet for the time being had the powers of a tenant for life by virtue of s. 58, sub-s. 1, (i.), p. 285, *post;* and the learned judge acceded to the application, and made an order for the sale of the plate. It is possible that this decision may be followed; but it seems to have been due to a misapprehension of the cases cited and relied upon. The cases of *Rex* v. *Knollys*, Ld. Raym. 10, Salk. 509, 3 *Ibid.* 242, Comb. 273, Skin. 517, 12 Mod. 55, and *Earl Ferrers' Case*, 2 Eden, 373, do not seem to establish anything with regard to *dignities* generally, but only with regard to *earldoms;* and a characteristic, amounting to a pointed distinction between earldoms and baronetcies, is attributed to the former, when it is said that earldoms are for the defence of the king and realm, and that those offices *extend over all the land.* (Ld. Raym. p. 12, *fin.*, p. 13, *init.* "The earldom is not confined to the place, but extends through the whole kingdom": 12 Mod. p. 60, *init.*) This agrees very well with what is said in *Nevil's Case*, 7 Rep. 33, at p. 33b, that the earl, "by the common law, is a great conservator of the peace, and the sheriffs are called '*Vice-com.*' because, in ancient times, they were

as deputies to earls, though now it is changed;" though, in that case, the idea of the almost universal connection of titles of dignity with particular specified places is more prominent. Nothing favourable to the decision of Mr. Justice Chitty can be extracted from the mention of the Earldom of Rivers, in Ld. Raym. 16, and elsewhere, or from *Earl Ferrers' Case*, *supra*. It may be doubted whether the express authority of the resolution reported in 12 Rep. 81, *Honours and Dignities*, that if the king creates a dignitary, and "does not create him of some place, he shall not have an estate tail, but fee simple conditional," ought to have been overruled, so far as baronetcies are concerned, upon the ground that it appears not to be applicable to earldoms; and it can hardly be doubted that the whole matter did not receive any exhaustive consideration, nobody concerned in the case appearing to entertain any suspicion that there could be a distinction in this respect between an earldom and a baronetcy. This confusion appears to have been carried much further in *Re Earl of Aylesford's Settled Estates*, 32 Ch. D. 162, as to which see note on s. 36, p. 255, *ante*, where it seems to have been imagined that the case of Sir J. Rivett-Carnac was somehow in point.

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For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form VII., p. 380, *post*. As to service, see *Re Brown's Will*, 27 Ch. D. 179.

X.—Trustees.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

Sect. 38. Appointment of trustees by Court.

For the definition of trustees of a settlement "for purposes of this Act," see s. 2, sub-s. (8), p. 188, *ante*. Trustees appointed under this section have the power to give receipts which is conferred by s. 40, *post*. (*Cookes* v. *Cookes*, 34 Ch. D. 498.)

The words, "if at any time there are no trustees," remove a doubt which once existed as to the practice under 13 & 14 Vict. c. 60, s. 32, and 15 & 16 Vict. c. 55, s. 9. (See *Re Moore, McAlpine* v. *Moore*, 21 Ch. D. 778, and cases there cited.)

Trustees specially appointed for purposes of the Act, and distinct from the trustees of the settlement, seem to have no power to appoint new trustees of their own class, either by virtue of the

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Conv. Act, 1881, s. 31, p. 91, *ante*, or otherwise. That section seems to refer only to trustees in whom trust property is vested. (See sub-s. 4 thereof.) This view appears to have been taken in *Re Wilcock*, 34 Ch. D. 508, and *Re Kane's Trusts*, 21 L. R. Ir. 112. If the trustees are trustees for purposes of the Act by virtue of having a present power of sale, or a power to consent, as mentioned in s. 2, sub-s. (8), p. 188, *ante*, they doubtless have power to appoint their successors. And though a power contained in the settlement to appoint new trustees of the kind last mentioned would enable trustees for purposes of the Act to be appointed, it is less clear that a power could be given to appoint distinct trustees for the purposes of the Act only. Persons nominated under a power do not seem to be "declared to be trustees" by the settlement; and it is to be observed that, in the parallel case of protectors of a settlement, appointed as such by the settlement and not deriving their powers from the possession of a prior estate, the Fines and Recoveries Act, s. 32, expressly authorizes the insertion of a power to appoint new persons to vacancies in the office.

In certain cases, where no trustees of the settlement for purposes of the Act exist, such trustees must be appointed before certain powers given by the Act can be exercised, by reason of the notices required to be given by s. 45, p. 267, *post*, as amended by the S. L. Act, 1884, s. 5, p. 303, *post*. But it has been held that, where trustees have been appointed under s. 60, p. 291, *post*, for the purpose of exercising the powers of an infant tenant for life, it is not necessary to appoint other trustees under the present section, for the purpose of receiving such notices. (*Re Countess of Dudley's Contract*, 35 Ch. D. 338.) But in such case the purchase-money must be paid into Court. (*Ibid.*)

As to the appointment of trustees in relation to the property of infants, see s. 59, and note thereon, p. 290, *post*.

It will be necessary to appoint trustees for purposes of the Act, if the trustees of the settlement have only a deferred power of sale. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.)

Trustees appointed by the Court should be independent persons, in order that the interests of remaindermen may be adequately protected. The tenant for life, or a person who might become tenant for life, even if a trustee of the settlement for other purposes, will not be appointed a trustee for purposes of the Act. (*Re Harrop's Trusts*, 24 Ch. D. 717.)

In *Wheelwright* v. *Walker*, *supra*, at p. 763, Kay, J., refused to appoint the solicitor of the tenant for life, who happened to be a trustee of a settlement of which the trustees had only a deferred power of sale (see s. 2, sub-s. 8, p. 188, *ante*), to be a trustee for purposes of the Act, the assignee of the reversioner objecting to the appointment. (See also *Re Kemp's Settled Estates*, 24 Ch. D. 485.) In *Re Knowles' Settled Estates*, 27 Ch. D. 707, Pearson, J., refused to appoint two relatives as trustees for purposes of the Act.

In a case where English and Irish estates were comprised in the same settlement, and all the beneficiaries lived in England, the Irish Court appointed, as trustees of the Irish estates for the purposes of the Act, two persons who had been appointed by the

English Court trustees of the English estates, although those persons lived in England. (*Re Maberly's Settled Estate*, 19 L. R. Ir. 341.) **S.L.A. 1882, Sect. 38.**

When trustees of the settlement exist who are not trustees for the purposes of the Act (for example, trustees with a deferred power of sale) they will be appointed trustees for purposes of the Act, if they are fit persons. But this will not necessarily apply to a case where there exist several sets of trustees. (*Re Stoneley's Will*, 27 Sol. Journ. 554.) It is the practice to require as strict proof of fitness as though the proposed persons were not already trustees for any purpose.

It has been considered expedient to appoint new trustees under the following circumstances: Where there is difficulty in obtaining administration to a deceased trustee, *Re Matthew's Settlement*, 2 W. R. 85, *Davis* v. *Chanter*, 6 W. R. 416; where one of two trustees for sale is an infant, *Re Porter's Trusts*, 4 W. R. 417; but the order must provide that the infant, on attaining majority, may apply to be restored to the trusteeship, *Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt*, W. N. 1883, p. 220; where a trustee has gone permanently to reside abroad, *Re Bignold's Settlement Trusts*, L. R. 7 Ch. 223; where a trustee has become incapable through age and infirmity, *Re Lemann's Trusts*, 22 Ch. D. 633; but in such cases, unless the trustee himself consents, the vesting order must be made in Lunacy as well as in Chancery, *Re Boyce*, 4 De G. J. & S. 205; *Re Phelps*, 53 L. T. 27; where a trustee is bankrupt, and his duties involve dealing with moneys belonging to the trust, *Re Barker's Trusts*, 1 Ch. D. 43; *Re Hopkins, Dowd* v. *Hawtin*, 19 Ch. D. 61 (though the rule is not absolutely rigid, see *Re Bridgman*, 1 Dr. & Sm. 164), or is a liquidating debtor, *Re Adams' Trusts*, 12 Ch. D. 634; where a trustee has permitted his co-trustee to commit a breach of trust, *Ex parte Reynolds*, 5 Ves. 707; where the donee of the power to appoint new trustees is abroad, *Re Humphry*, 1 Jur. (N. S.) 921; where the trustees have all predeceased the testator, *Re Smirthwaite's Trusts*, L. R. 11 Eq. 251; if it is doubtful whether the power in the settlement applies to the case, *Re Woodgate's Settlement*, 5 W. R. 448; where a vesting order is requisite, *Re Davies*, 3 Mac. & G. 278.

If the trustee to be displaced is a lunatic, the application must be made in Lunacy; and if he is a bankrupt, the petition must be intituled in the Bankruptcy Act. The case of a trustee convicted of felony is provided for by 15 & 16 Vict. c. 55, s. 8.

Under special circumstances, where the estate was very small, to avoid expense the Court has sometimes made an order without previous service on the committee. (*Re McGowan*, 29 Sol. Journ. 25.)

The Court has refused to displace an existing trustee and appoint another under the following circumstances:—On an allegation that the donee of the power was about to appoint corruptly, *Re Hodson's Settlement*, 9 Ha. 118; on the ground that a trustee is of great age (*ibid.*); on account of temporary absence abroad, *Re Moravian Society*, 26 Beav. 101.

It is conceived that the Court will follow the same principles,

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so far as they are applicable, in appointing trustees under the present section.

The V.-C. of Ireland, in *Burke* v. *Gore*, 13 L. R. Ir. 367, held that the exercise of the power conferred by this section is optional, and that the Court ought to be satisfied, not only as to the fitness of the proposed persons, but also that the object of their appointment is such as to render such appointment safe and beneficial for all the beneficiaries. In the above case it was desired to make an investment authorized by the Act but not by the will. This decision is scarcely consonant with the practice of the English Courts, which are not usually curious to inquire what will be the indirect effect of appointing trustees.

Orders under this section appointing trustees require a 10*s.* stamp.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

A single personal representative of the last trustee could not act in any capacity which would otherwise require the concurrence of more than one trustee. See the next following section.

As to the service of notices in applications to the Court under this section, see the S. L. Act Rules, 1882, r. 4, p. 375, *post*.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XIX., p. 384, *post*.

A summons may be entitled in the matter of the Act, although a suit is pending for the administration of the settled estate. (*Re Parry*, W. N. 1884, p. 43.)

Sect. 39. Number of trustees to act.

39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

The settlement must expressly authorize one trustee to give receipts; and it is not enough that he has by statute an implied

power. But, notwithstanding the passing of s. 29 of Lord Cranworth's Act (superseded by the Conv. Act, 1881, s. 36, p. 101, *ante*), many subsequent settlements contain an express "trustees' receipt clause;" and cases where such a clause authorizes one trustee to give receipts seem to be within the present section. In the absence of judicial decision, it will be the only safe course for purchasers under the present Act, where there is a single trustee, not to accept his sole receipt, unless only one trustee (being a trustee for the purposes of the Act) was appointed by the settlement, or the settlement contains a declaration framed on the language of the present section. S.L.A. 1882, Sect. 39.

It would seem to have been held by Bacon, V.-C., that the fact that the trusts may be exercised by "the trustees *or trustee*" for the time being is sufficient to authorize payment of capital money to a single continuing trustee. (*Re Garnett Orme's Contract*, 25 Ch. D. 595.) *Sed quære.*

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised. Sect. 40. Trustees' receipts.

This must be read with the last preceding section. And compare the Conv. Act, 1881, s. 36, p. 101, *ante*.

As the power conferred by this section is exerciseable by trustees appointed under s. 38, *ante* (see *Cookes* v. *Cookes*, 34 Ch. D. 498), it will probably be held to be also exerciseable by trustees expressly appointed by the settlement as trustees for the purposes of the Act, but not having any power of sale.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for Sect. 41. Protection of each trustee individually.

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any loss not happening through his own wilful default.

Notwithstanding the protection given to trustees by this section, and by the Property and Trustees Relief Amendment Act (22 & 23 Vict. c. 35), s. 31, every trustee is still under an obligation, in dealing with trust funds, to take all reasonable precautions and to use the same degree of care as would be observed by a prudent man in dealing with his own funds. Any "banker, broker or other person" with whom he deals must be of good repute, and such as a prudent man would employ. See generally, for remarks as to the liability of trustees for the acts of their agents, *Speight* v. *Gaunt*, 22 Ch. D. 727, 9 App. Cas. 1. A trustee is not liable for fraud committed by a co-trustee, if the innocent trustee has neither done nor permitted anything enabling the fraud to be committed. See *Barnard* v. *Bagshaw*, 3 De G. J. & S. 355.

The 22 & 23 Vict. c. 35, s. 31, only embodied the previous doctrine of the Court; and it seems to apply to previously executed settlements. (*Bennett* v. *Lytton*, 2 J. & H. 155.)

A trustee who is cognizant of a breach of trust committed by a co-trustee, will be bound to take steps to hold him liable.

A trustee will not be at liberty to leave money indefinitely at a bank on a deposit account, unless that is a mode of investment expressly authorized by the settlement. (*Rehden* v. *Wesley*, 29 Beav. 213.) The same principle applies to leaving an unduly large balance on a current account. (*Astbury* v. *Beasley*, W. N. 1869, p. 96; 17 W. R. 638.) Also to money left for an unreasonably long time in the hands of a co-trustee uninvested. (*Williams* v. *Higgins*, W. N. 1868, p. 49.)

Some meaning must be given to the words "notwithstanding his signing any receipt for conformity," and therefore it is conceived that, notwithstanding s. 39, *ante*, the ordinary rule as to trustees signing joint receipts will apply, even in the case of capital moneys. The contrary hypothesis would cause great inconvenience in the case of mining leases, where part of the income is treated as capital. See s. 11, p. 205, *ante*.

Where a breach of trust is made possible through the negligence or acquiescence of a co-trustee, though the latter cannot escape ultimate liability, the trustee who was actively concerned in the breach of trust is primarily liable. (*Stone* v. *Bennet*, W. N. 1876, p. 152.)

Trustees, in employing agents, must employ them only in the ordinary course of business, and will incur liability if they should (for example) pay over money to a solicitor for investment, without seeing that the investment is actually made. (*Bostock* v. *Floyer*, L. R. 1 Eq. 26.)

See further, as to the receipt of money by agents appointed by trustees, Trustee Act, 1888, s. 2, and note thereon, p. 313, *post*.

Sect. 42. Protection of

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not

making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

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trustees generally.

As to the possible liability of trustees for "approving" an improvident scheme of improvement, see note to s. 25, at p. 236, *ante*.

This section also imposes on trustees the duty of seeing that every conveyance of land purports to convey in the proper mode. This seems to refer only to lands acquired by the settlement, and their liability seems to be restricted to seeing that the land purports to be vested in the proper persons to the proper uses.

The protection afforded by this section to trustees is restricted to—(1) giving consents; (2) neglecting to take action upon notices received; and (3) dealings with land. It does not embrace any of the other duties cast upon them in connection with the Act, or by the ordinary course of law and equity.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Sect. 43.

Trustees' reimbursement.

A difficulty may arise in cases where the trustees for the purposes of the Act are distinct from the trustees of the settlement, and no capital money arises under the Act. In such cases the trustees for the purposes of the Act should be careful to incur no expenses, unless they can be provided for by means of an application to the Court under s. 46, sub-s. (6), p. 270, *post*.

Where the trustees of the settlement are the same as the trustees for the purposes of the Act, it is conceived that they may, out of any funds in their hands in the former capacity,

S.L.A. 1882, Sect. 43. reimburse themselves any expenses properly incurred in the latter capacity.

Sect. 44. Reference of differences to Court.

44. If at any time a difference arises between a tenant for life, and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

So far as the trustees are concerned, the powers and rights conferred by the Act on the tenant for life are of three kinds:—

(1) Those which cannot be exercised without the consent or approval of the trustees or an order of Court—namely, to sell or lease the principal mansion house and the demesne (s. 15, *ante*), to carry out authorized improvements (s. 26, sub-s. 2, *ante*), and to cut timber (s. 35, *ante*);

(2) Those which cannot be exercised without the notice mentioned in s. 45, *post*; and

(3) Those which may be exercised quite independently of the trustees.

Applications to the Court under this section are more likely to occur with regard to the first two classes than to the third; but there is nothing to prevent the trustees from interfering, whenever they believe the proposed exercise of any power to be prejudicial to the inheritance. It is conceived that a proposed improvident exercise of a power, not amounting to a fraud, would be a sufficient ground for their interference.

Though the trustees are under no duty to control the tenant for life in cases of sale, it would be right for them, if a sale were proceeding of which they did not approve, to submit the matter to the Court. See *Hatten* v. *Russell*, 38 Ch. D. 334, at p. 344.

This section includes trustees appointed for purposes of the Act, whether under s. 38, p. 259, *ante* (*Hatten* v. *Russell*, *ubi supra*, at p. 334), or expressly appointed by the settlement, whether with or without a power of sale.

As to costs, see s. 46, sub-s. (6), p. 270, *post*. It is presumed that the ordinary rule as to trustees' costs will be followed; and that, even when unsuccessful, they will be entitled to their costs, unless their interference has been plainly unreasonable. Any other rule would practically preclude all applications by trustees. Costs ordered to be paid out of the *corpus* of the trust estate may be raised by mortgage. (See s. 47, p. 271, *post*.) The trustees' costs of successfully opposing the grossly improvident exercise of a power, might very reasonably be ordered to be paid out of income.

As to the service of notices in applications to the Court under this section, see the S. L. Act Rules, 1882, r. 4, p. 375, *post*.

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XX., p. 384, *post*. S.L.A. 1882, Sect. 44.

Sect. 45. Notice to trustees.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

See S. L. Act, 1884, s. 5, and notes thereon, p. 303, *post;* which enactment has rendered it now unnecessary to specify any particulars of intention, when giving the notices required by this section, as was previously necessary. (See *Re Ray's Settled Estates*, 25 Ch. D. 464.)

If there are no such trustees, the tenant for life may be restrained from exercising the powers in this section mentioned, until trustees have been appointed under s. 38, p. 259, *ante*. (*Wheelwright* v. *Walker*, 23 Ch. D. 752.) This ruling seems to have been adopted in *Re Taylor*, W. N. 1883, p. 95; 31 W. R. 596; where a petition by the committee of a lunatic tenant for life, for authority to grant a repairing lease of a house, comprised in the settlement, for ninety-nine years, was ordered to stand over for the appointment of trustees. (See also *Re Bentley*, *Wade* v. *Wilson* (No. 2), 33 W. R. 610.)

If there is no money to be received in consequence of the proposed dealing, a single surviving trustee will be competent to receive the prescribed notices. (See s. 39, p. 262, *ante*.)

As to notice to solicitors, see the Conv. Act, 1882, s. 3, sub-s. (1), (ii.), and note thereon, p. 167, *ante*. It is not easy to say who is indicated by the phrase, "the solicitor for the trustees." It is conceived that he must be the solicitor, if any, who is, to the knowledge of the tenant for life, usually employed by the trustees in reference to the trust; and that a solicitor appointed for the purpose only of receiving notices, but not otherwise connected with the trust, would not suffice. The notices to the solicitor seem to be meant rather for the protection of the inheritance than for the information or protection of the trustees. By this means information of any intended dealing with the settled estate has an additional chance of reaching the

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ears of remaindermen. This is a good reason for supposing that trustees, when exercising powers on behalf of infants, must give the prescribed notice to their own solicitor. But it is not clear what liabilities or disabilities would attach to a tenant for life who should even wilfully neglect to give such notice. The provision may be useful in cases where the notices posted to the trustees fail to reach their destination.

It is suggested that when a provision to render unnecessary the giving of these notices is inserted into a settlement, such provision should in general be restricted to the granting of ordinary leases without notice.

The utility of the notices is somewhat impaired by the provisions of s. 42, p. 264, *ante*. But, in spite of the sweeping expressions of that section, it is conceived that trustees cannot safely commit what would, independently of that section, be gross negligence or a breach of trust in respect of such notices.

It is conceived that the word "or," occurring before the words "of a contract for the same," is not disjunctive; and that if a *binding* contract is concluded before the execution of a conveyance, the notice was intended to precede the contract, and that notice merely preceding the conveyance would not suffice. Any other interpretation would make this section nugatory. The tenant for life has power to enter into binding contracts; see s. 31, p. 246, *ante*. It will often be convenient to enter into a provisional contract which is not to become binding until the expiration of the prescribed month, and is to be subject to the result of any legal opposition which may be raised by the trustees or any persons interested under the settlement.

Nevertheless, it has been held that a purchaser cannot treat as a defect of title the mere fact that the notice has preceded the conveyance, and not the contract (see *Duke of Marlborough* v. *Sartoris*, 32 Ch. D. 616); and a purchaser is sufficiently protected if, at the time of the execution of the conveyance, there are trustees to whom he may pay his purchase-money, if required so to do; at any rate, if he is not actually aware that due notice has not been given to them. (*Hatten* v. *Russell*, 38 Ch. D. 334.)

In s. 44, p. 266, *ante*, the expression "a difference" does not seem to be restricted to cases in which the concurrence of the trustees is required, but to include cases in which they may think it their duty, on receiving notice thereof, to raise objection to a proposed exercise of his powers by the tenant for life.

The committee of a lunatic must obtain authority from the Court in Lunacy to give notice under this section. (See *Re Ray's Settled Estates*, 25 Ch. D. 464.)

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

By s. 39, p. 262, *ante*, capital money may be paid to a sole trustee appointed by the settlement. It is conceived that the appointment of a single trustee with a power of sale would be a sufficient indication, though it would not, strictly speaking, be

an expression of a contrary intention within the meaning of this sub-section. It would be absurd to require the appointment of another trustee merely to receive the notice, when he would not be needed to receive the money. It also seems clear that, if the tenant for life is himself one of the trustees, notice to the other trustee will be sufficient.

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(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

It is presumed that, in accordance with a well-known principle, a person dealing with the tenant for life will not, in the absence of suspicious circumstances, be entitled to require proof that the statutory notices have been given. He seems to be entitled to proof of the existence of trustees for the purposes of the Act, in due time before the completion of the conveyance. It has been held that he is sufficiently protected if, at the time of the execution of the contract, there are trustees to whom he may pay his purchase-money if required so to do; at any rate, if he is not actually aware that due notice has not in fact been given to them. (*Hatten* v. *Russell*, 38 Ch. D. 334.) But it is conceived that, if he is aware that the notices have not been given, he cannot safely complete until the defect has been remedied, by waiver or otherwise. See S. L. Act, 1884, s. 5, sub-s. (3), p. 304, *post*.

XI.—Court; Land Commissioners; Procedure.

Sect. 46. Regulations respecting payments into Court, applications, &c.

46.—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

The option judiciously given by this sub-section has been practically repealed by the S. L. A. Rules, 1882, r. 2, p. 375, *post*. But it was held in *Re Bethlehem and Bridewell Hospitals*, 30 Ch. D. 541, that if an application by petition appears to be more advantageous than by summons, the costs of the petition will be allowed. In that case the Court was dealing with a fund which had been paid in under the Lands Clauses Act; but the ruling seems to be of general application.

(4.) On an application by the trustees of a settle-

S.L.A. 1882, Sect. 46.

ment notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

Notices are prescribed by the S. L. Act Rules, 1882, rr, 4, 5, and 6, p. 375, *post.*

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

See note on s. 44, p. 266, *ante.* For the mode of raising these costs, see the next following section.

In *Re Greenville Estate,* 11 L. R. Ir. 138, cited in the note on s. 60, at p. 292, *post,* the costs were allowed out of the purchase-money.

In cases of urgency it will sometimes be necessary to commence an action and apply for an injunction. This section does not seem to preclude this course.

For cases as to costs, see, also, note on s. 21, sub-s. (x.), p. 230, *ante.*

(7.) General rules for purposes of this Act shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

39 & 40 Vict. c. 59.
44 & 45 Vict. c. 68.

For Rules, dated December, 1882, see p. 375, *post.*

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and Rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

Here the words, "acting in," seem to mean, "attached to."

(9.) General Rules, and Rules for the Court of

Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act. S.L.A. 1882, Sect. 46.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connexion with which the personal chattels to be dealt with in the Court are settled.

If an order for the sale by auction of chattels under s. 37, p. 256, *ante*, should have been made by a county court, upon the assumption that they are worth less than 500*l*., the sale ought to be stopped if the biddings should exceed that sum. It is possible that a *purchaser* might be protected by the Conv. Act, 1881, s. 70, p. 152, *ante*. Though in that section "the Court" means only the High Court of Justice, and does not include the county court, which has no jurisdiction under that Act, yet since, under the present Act, the county court has not, strictly speaking, a jurisdiction of its own, but exercises "the powers of the Court," its orders may be construed as orders made by the High Court vicariously.

47. Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the

Sect. 47. Payment of costs out of settled property.

S.L.A. 1882, Sect. 47.

same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

See s. 21, sub-s. (x.), p. 230, *ante*.

In cases where the Court is of opinion that any costs ought to be paid by the tenant for life, if there are in the hands of the trustees any investments representing capital money arising under the Act, or any accumulations of rents or other income to which the tenant for life is entitled, the costs will probably be ordered to be paid out of the income of investments, or out of such accumulations, &c. If there are no such investments or accumulations, the tenant for life would be ordered personally to pay by virtue of s. 46, sub-s. (6), p. 270, *ante*.

It is presumed that the tenant for life will be ordered to pay costs only in cases of improvidence or misconduct on his part, or where the application is solely for his own benefit. In cases of the last-mentioned description, the tenant for life has to pay costs incurred under the Trustee Acts (Seton, p. 527). But since, in exercising his powers, the tenant for life is a trustee for all parties (s. 53, p. 279, *post*), it is probable that whatever is necessary to enable him to exercise his powers will be regarded as being *primâ facie* a benefit to the whole estate; and therefore it seems improbable that the tenant for life will be ordered to pay costs of applications made by himself for the appointment of trustees for the purposes of the Act, when there are none such under the settlement.

Sect. 48. Constitution of Land Commissioners; their powers, &c.

48.—(1.) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

(2.) The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them. S.L.A. 1882, Sect. 48.

(4.) All Acts of Parliament, judgments, decrees, or orders of any Court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to 27 & 28 Vict. c. 114.

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the Land Commissioners under any Act making provision as last aforesaid; and the provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

This section was originally contained in the draft bill of the Conv. Act, 1881 (see Wolstenholme and Turner, Conv. Acts, 1st ed. p. 225), and, in its original shape, made express mention of the present Act, which was then expected to become law during the same session. The words of the present section do not strictly suffice to bring the present Act within its scope, though probably that was the intention.

Sect. 49. Filing of certificates, &c. of Commissioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

The Land Commissioners have no power under this Act to "approve" any certificates or reports, or, indeed, anything else, except the "competent" engineers and "able practical" surveyors mentioned in s. 26, sub-s. (2), (ii.), *ante*. The origin of the word's use in this section may probably be traced in the marginal note to that section. Their functions under the Act are restricted to the matters mentioned in sects. 26 and 28, *ante*.

XII.—Restrictions, Savings, and General Provisions.

Sect. 50. Powers not assignable; contract not to exercise powers void.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation

of law or otherwise, of his estate or interest under the settlement. S.L.A. 1882, Sect. 50.

It is the ordinary rule that a power conferred by a settlement is not destroyed by the alienation of a beneficial interest taken under the settlement by the donee of the power. (*Alexander* v. *Mills*, L. R. 6 Ch. 124.) When the effect of such exercise would be to derogate from the grant of the person having the beneficial interest, the consent of the alienee is necessary. (*Re Cooper, Cooper* v. *Slight*, 27 Ch. D. 565.) But in *Hardaker* v. *Moorhouse*, 26 Ch. D. 417, it was held by North, J., that the consent of an alienee was not necessary to the exercise of a power of appointment of new trustees.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

"Tenant for life" is here loosely used to mean a person who would have been tenant for life if he had not assigned, or otherwise been deprived of, his life interest.

A tenant for life in remainder, who has disposed of his interest before it falls into possession, neither is, nor ever was, "entitled to possession" of the settled land (see s. 2, sub-s. 5, *ante*), even after his interest has fallen into possession. Yet he seems to be here called a "tenant for life."

A mortgagee of the life interest of the tenant for life has power, while in possession, to make leases determinable upon the death of the tenant for life, by virtue of s. 18, sub-s. (2), of the Conv. Act, 1881, p. 60, *ante;* unless this power is excluded by the

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mortgage deed. The mortgagor also (being tenant for life) has, by virtue of the same section, and apart from his powers as tenant for life under the present Act, power, while in possession, to make leases for his own life.

The question may arise, whether a common law lease made by a tenant for life, not in exercise of his statutory power, is liable to be over-ridden by a subsequent lease made by the same tenant for life under this Act. The same question also arises with regard to a lease made under s. 18, sub-s. (2), of the Conv. Act, 1881, *ante*, by a mortgagee who has entered into possession of the life estate of the tenant for life; because such a leasehold interest is derived out of the life estate, and is liable to be defeated by anything which defeats the life estate. It is conceived that this question must be answered in the negative, notwithstanding the strong language of s. 20, sub-s. (2), of the present Act, p. 218, *ante*, and notwithstanding the fact that the above specified cases do not seem to come within any of the exceptions specified in that sub-section. As to the first case, namely, that of a lease granted by the tenant for life, it seems not to come within the provisions of the present section, the lease not being an assignment; so that, his powers not being preserved to him thereby, it may be inferred that he is *pro tanto* deprived of them by his previous act. And as to both cases, it seems that there is no sufficient obstacle to the application of the maxim, that a man may not derogate from his own grant; though this may be not so clear in the second case as in the first.

Of course the leases contemplated by the present sub-section are such as are described in s. 6, p. 198, *ante*. A tenant for life who has not incumbered his interest is not subject to the restriction, "without fine," in granting leases. This is implied by the S. L. Act, 1884, s. 4, p. 302, *post*. Upon the danger to the lessee of accepting a lease in consideration of a fine without investigating the lessor's title, see note to the Conv. Act, 1881, s. 3, sub-s. (1), at p. 8, *ante*.

An "assignee for value" seems to be opposed to a mere volunteer, and therefore to include a trustee in bankruptcy or liquidation.

If a tenant for life should assign or mortgage his life interest, this sub-section does not preclude him from covenanting to exercise his statutory powers at the request of the assignee or mortgagee. But such a covenant might be held to be void; first, as being a fraud upon sub-s. (1) of the present section; and, secondly, as being, by virtue of s. 53, p. 279, *post*, in a fiduciary position, of which the assignee or mortgagee must, from the nature of the case, be cognizant. Therefore it is doubtful if such a covenant would be specifically enforceable in equity, or whether damages could be recovered at law for a breach of it.

Except so far as regards the leases in this sub-section mentioned, the tenant for life seems not to be able to exercise his statutory powers after an assignment, whether absolute or by way of mortgage, of his interest, without the concurrence of the assignee or mortgagee. For example, he cannot "sell the settled land or any part thereof;" because, though such a sale may be a sale of a *part* only of the *settled land*, it must be a sale of the

S.L.A. 1882, Sect. 50.

whole estate or interest therein comprised in the settlement. It seems to follow that the assignee can prevent, but cannot compel, the exercise of the powers.

This result seems also to follow from s. 53, p. 279, *post*, by which the tenant for life is declared to be a trustee in relation to the exercise of his statutory powers. Since the land, if sold without the concurrence of the assignee or mortgagee, would necessarily be sold subject to the assignment or mortgage, it follows that the price obtained must be less than the full market value of an unincumbered estate in possession; and the tenant for life would not be justified in accepting such diminished price, nor would a purchaser under such circumstances acquire a secure title. In *Re Sebright's Settled Estates*, 33 Ch. D. 429, the Court of Appeal, affirming the decision of North, J., refused to sanction a sale of a mansion house, on an application under s. 15, p. 211, *ante*, made without the consent of the tenant for life's mortgagees; and North, J., appears to have laid stress upon the fact that the tenant for life's interest was mortgaged to its full value. But this circumstance seems not to be essential to the argument.

If a bankrupt tenant for life refuses to exercise his powers, the remedy is not that the Court should confer similar powers on other persons, but should consider the particulars of a scheme presented by the beneficiaries, and order the bankrupt to carry them out. (*Re Mansel's Settled Estates*, W. N. 1884, p. 209.)

As to the costs of obtaining the consent of the tenant for life's assignee of his life estate, see note on s. 21, sub-s. (x.), p. 230, *ante*.

It seems to be questionable policy to leave the statutory powers in the hands of a bankrupt tenant for life, since the exercise of any similar powers by any other persons is forbidden without his consent. (See s. 56, sub-s. 2, p. 282, *post*.)

Though it was not the usual practice before the Act to provide for the cesser of any powers, whether of consent or otherwise, given by the settlement to the tenant for life, upon his bankruptcy, &c., this was so only because in most cases the danger is remote. Where there was any ground for apprehending such danger or inconvenience, the consent of the tenant for life was not made necessary to the exercise of powers by trustees.

The inconvenient results likely to be caused by this section may be avoided by giving to the tenant for life a life interest determinable on bankruptcy, assignment, or incumbrance. There is nothing in the Act to prevent the insertion of such a provision, as long as it is not extended to assignments, &c., made in exercise of his statutory powers.

Such a determinable interest is frequently followed by a trust to apply the whole or any part of the income, at the discretion of the trustees, among such members of a class, usually composed of the bankrupt himself and his immediate family, as the trustees may think fit. In cases where there is a trust to accumulate any part for the benefit of some persons absolutely, it seems doubtful whether, after the bankruptcy of the original tenant for life, there will be any tenant for life under the Act; and, if there be

S.L.A. 1882, Sect. 50.

any, of what persons it is composed, by virtue of s. 2, sub-s. (6), p. 187, *ante*.

In such a case considerable difficulty may arise in respect to the title, if the trustees should wish to exercise any power of sale, &c., given to them by the settlement.

The statutory powers of a tenant for life of course cease with the cesser of his estate by lawful forfeiture.

If a tenant for life of land is also the owner in fee simple of adjoining land, he cannot, by his dealings with the adjoining land, lessen or restrict his statutory powers over the settled land. (*Fass* v. *Gunter*, 30 Sol. Journ. 726: a decision pronounced in vacation.)

Sect. 51. Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

This section is not confined to attempts made by the settlor himself to restrain the tenant for life under the settlement from exercising his powers, but extends also to attempts made by other persons, or (which is practically the same thing) made by the same settlor in a separate instrument. With this object the

words, "will, assurance, or other instrument," are added to "settlement." S.L.A. 1882, Sect. 51.

The only form of restraint on alienation which is forbidden by this section is restraint on alienation of *the settled land*, not restraint on alienation of *the income of the tenant for life* derived therefrom, or from the proceeds of investments representing the same, or from the improved value of other settled land owing to improvements made with capital moneys arising under the Act, &c. The exercise of the statutory powers is in effect only a change of investments made by a person who is at the same time a beneficiary and (for some purposes) a trustee; and merely to forbid him to alienate his *beneficial interest* in the investments, seems to have no bearing upon his willingness or capacity to exercise his *fiduciary powers*.

A gift over on ceasing to reside in a particular mansion house, being part of the settled land, may be defeated by an exercise of the statutory power of sale. (*Re Paget's Settled Estates*, 30 Ch. D. 161.) But there is nothing to prevent a settlor from obliging a tenant for life to reside in such mansion house until it shall be sold, leased, or otherwise disposed of, by exercise of the statutory powers. (See *Re Haynes, Kemp* v. *Haynes*, 37 Ch. D. 306.)

A trust to sell the life estate, coupled with a covenant on the part of the tenant for life not to retain the life estate *in specie*, will not deprive him of his statutory powers. (*Re Hale and Clark*, W. N. 1886, p. 65; 34 W. R. 624.)

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture. Sect. 52. Provision against forfeiture.

See note on last section, and *Re Paget's Settled Estates*, there cited.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Sect. 53. Tenant for life trustee for all parties interested.

This section alters the position of the tenant for life in reference to the other persons interested under the settlement, so far as the Act gives him increased powers. A tenant for life is not in general a trustee for them, as to improvements which he may make in the estate. (See *Re Earl of Berkeley's Will*, L. R. 10 Ch. 56, at p. 59.) This may have an important bearing upon the allowance of costs to the tenant for life. It follows from the fiduciary position of the tenant for life that, except so far as regards purely ministerial functions, such as completing a definite contract, he cannot exercise his powers through an attorney.

In so far as any additional powers given by the settlement to the tenant for life are co-extensive with, or exceed, the powers

S. L. A. 1882, Sect. 53.

conferred upon him by the Act, he can, of course, exercise them without complying with the conditions, or being subject to the liabilities, imposed upon him by the Act in regard to the exercise of his statutory powers. Such additional powers are "cumulative." (See s. 56, sub-s. 1, p. 282, *post.*)

With regard to the language of the section, the following distinctions must be taken:—

1. The tenant for life has not, in respect to the other parties, the duties and liabilities of a trustee, in such a sense as to lay him under any obligation to exercise the statutory powers at the instance of any party other than himself;
2. He will be entitled to exercise the powers, notwithstanding the opposition of other parties, provided that such exercise be conducted in a fair and proper manner. For example, objection, if any, must be alleged, not against the fact of a sale, but against the way in which a sale is made, or proposed to be made;
3. He is a trustee only so far as regards the mode in which, and the circumstances under which, he exercises his powers, not a trustee of the proceeds arising therefrom;
4. The fact that he personally will derive a benefit from the exercise of his powers, and that it may be to the detriment of the remainderman, is no objection. (*Re Lord Stamford's Estate*, 56 L. T. 484; and see note on s. 22, sub-s. (2), p. 232, *ante.*)

There seems to be nothing to exclude the operation of the statutes of limitation in his favour, in respect of questions arising under the last head.

Conflicts of interest between tenants for life and remaindermen frequently arise in respect to sales of leasehold estates and reversions; as to which, see note on s. 34, p. 251, *ante.*

The tenant for life is apparently disabled from buying the settled land from himself under a sale made in exercise of the statutory power; but if the trustees have a power of sale under the settlement (exerciseable by virtue of s. 56, sub-s. (2), p. 282, *post*, only with the consent of the tenant for life) there is nothing to deprive the tenant for life of the right which he would have, independently of the Act, to buy from them. It was held in *Dicconson* v. *Talbot*, L. R. 6 Ch. 32, that a tenant for life, though his consent be necessary to the exercise of the power of sale, stands in no fiduciary relation towards the remaindermen, and may buy from the trustees. The fiduciary position of the tenant for life under the present section has reference only to his own statutory powers, and does not seem to extend to a mere giving of consent to the exercise of powers by the trustees or other persons. It must, however, be observed that in *Re Duke of Newcastle's Estates*, 24 Ch. D. 129, Pearson, J., held that the trustees might consent on behalf of an infant under s. 60, p. 291, *post*, though that section only enables trustees to act on behalf of infants as regards the exercise of *powers*. But the learned judge seems not to have intended to decide that the giving of consent is, for any other purpose or in any other sense, the exercise of a power. There seems to be no reason why the provision in the Act requiring the consent of the tenant for life, should put him

in a worse position than if it had been contained in the settlement. S.L.A. 1882, Sect. 53.

There is no reason to suppose that, on a sale or lease made under the statutory power, the tenant for life will be relieved from covenanting for title to the extent of his beneficial interest.

There appears to be no reason why this section should not extend to all persons who, by virtue of sects. 58, and 60—62, pp. 284, 291—294, *post*, are enabled to exercise the powers of a tenant for life.

"I think that the meaning of the 53rd section is that, for the security of the remaindermen, as between the tenant for life and them, he, in exercise of this power, shall be treated as a trustee, and shall have all the liabilities of a trustee exercising a like power. The consequence of that is, no doubt, that if a purchaser knows that a tenant for life is exercising the power improperly, and is aware that what the tenant for life is doing would amount to a breach of trust, he, the purchaser, has a perfect right to say, I will not complete." (Per Kay, J., in *Hatten* v. *Russell*, 38 Ch. D. 334, at p. 345.)

Although a tenant for life is by this section made a trustee in a certain sense, it does not follow that he is in all cases entitled to trustees' ordinary costs. (See *Sebright* v. *Thornton*, W. N. 1885, p. 176.)

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act. Sect. 54. General protection of purchasers, &c.

It is presumed that the protection given by this section to dealings "with a tenant for life" will be extended to dealings with trustees exercising powers on behalf of persons under disability, and "limited owners" who "have the powers of a tenant for life." (See sects. 58, 60—62, *post*.)

The fact that this Act extends to Ireland may give a peculiar significance to the words, "that can reasonably be obtained *by the tenant for life*;" which words do not occur in the stipulations respecting best price, &c., in the previous sections of the Act.

This section refers only to the *amount* of the price, &c., and does not exonerate the person liable to pay it from seeing that it is paid to the proper person, or in the proper way.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court Sect. 55. Exercise of

S.L.A. 1882, Sect. 55.

or the Land Commissioners are exerciseable from time to time.

powers; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

On the question, whether deeds executed or taking effect under the Act must be expressed to be made in exercise of the statutory powers, see notes at p. 219, *ante*, and p. 285, *post*.

Sect. 56. Saving for other powers.

56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

See now the S. L. Act, 1884, s. 6, and notes thereon, p. 304, *post*.

It is conceived that the power of a devisee in trust to raise

money by sale or mortgage, to pay debts charged by the testator upon realty, which is conferred by the Property and Trustees' Relief Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 14, is not within the purview of this enactment. This remark seems also to apply to a similar power inserted in a settlement. There seems to be a distinction between a power to raise money for a definite purpose, and a power to sell land and to apply the purchase-money to the same purpose. But it is conceived that the trustee ought not to sell or mortgage, unless the tenant for life refuse to act in the matter. The question is not free from doubt. S.L.A. 1882, Sect. 56.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

The general aim of this section is made somewhat obscure by the arrangement of the language. In particular, the second clause of sub-s. (2) contains nothing which can appropriately be introduced by the words "and accordingly;" and the provision introduced by those words might more properly have been placed at the end of sub-s. (1). The general result is, that the tenant for life may, at his option, exercise powers given to him either by the settlement or by the Act, and that the trustees may exercise powers given to them by the settlement; but the consent of the tenant for life is necessary to the exercise by them of any powers which embrace any of the objects embraced by any of the powers conferred by the Act. (See *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.)

Notwithstanding the provision of sub-s. (1), that powers given by the Act are cumulative, trustees should be very cautious how they exercise powers having the same object as the statutory powers, and conferred upon them by the settlement, when there is a tenant for life who is not under disability. It is conceived that the consent of the tenant for life can only be given to a specific exercise of a power, and that it could not be given beforehand, or in general terms. He should at any rate be an active party to the sale, &c. If, subsequently to a sale made by the trustees in reliance upon a promise by the tenant for life to give his consent, the tenant for life, before actually consenting, should contract to sell for an advanced price, the trustees might be placed in a very awkward position.

A power to raise money by way of mortgage, for purposes other than those mentioned in ss. 18 and 47, *ante*, does not seem to be a power "exerciseable for any purpose provided for in this Act," and therefore does not seem, under sub-s. (2), to require the consent of the tenant for life to its exercise. But the same remark does not apply to powers which merely exceed, in the extent of their operation, powers given to the tenant for life; as, for example, power to lease for a longer term.

S.L.A. 1882, Sect. 56.

The consent of the tenant for life, when given under this section, should be expressed in any deed to the validity of which it is requisite, and he should execute the deed.

An equitable tenant for life, whose consent is necessary to a sale, must enter into the usual limited covenants for title. (*Re Sawyer and Baring's Contract*, W. N. 1884, p. 192; 33 W. R. 26.)

If an order for sale has been made by the Court under the Settled Estates Act, 1877, the Court may in its discretion stay the order, but until and unless this has been done, the tenant for life cannot sell under the present Act. (*Re Barrs-Haden's Settled Estates*, W. N. 1883, p. 188; 32 W. R. 194.) And if, under the Settled Estates Act, the Court has authorized trustees to exercise certain powers of leasing, the tenant for life, before exercising his powers under this Act, must apply to the Court to stay the operation of the order. (*Re Poole's Settled Estates*, 32 W. R. 956.)

Sect. 57. Additional or larger powers by settlement.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

By virtue of this section, a settlor may dispense with the giving of the notices prescribed in s. 45, p. 267, *ante*. But s. 56, sub-s. (2), p. 282, *ante*, prevents him from enabling the trustees to exercise any power "exerciseable for any purpose provided for in this Act," without the consent of the tenant for life.

For form of summons applicable to this section (for advice and protection), see Appendix to the S. L. Act Rules, 1882, Form XXI. p. 384, *post*.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

If a settlor desires to exempt the tenant for life from any of the restrictions imposed by the Act, he must be careful, in conferring more extended powers, expressly to declare such intention; because the restrictions might otherwise be imposed by this section upon the exercise of the extended powers.

As to powers given by the settlement to trustees, see s. 56 and note thereon, *ante*.

XIII.—Limited Owners generally.

Sect. 58. Enumeration of other

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession,

have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

S.L.A. 1882, Sect. 58.

limited owners, to have powers of tenant for life.

The object of this section is partly to enlarge the scope of the Act by giving to certain limited owners, who are not in any sense tenants for life under a settlement, the powers conferred on tenants for life, and partly to prevent evasion of the Act, by providing that certain persons who are substantially in the position of tenants for life under a settlement, but whose estate is subject to certain liabilities or contingencies, or is a chattel interest determinable on their death, shall have the like powers. It does not include a tenant in dower; and it seems not to include a husband seised in fee simple in right of his wife. These, however, may make leases for twenty-one years under the Settled Estates Act, 1877, s. 46.

The "powers of a tenant for life" seem to include powers to give consents and to exercise options, in addition to powers commonly so called.

In this section "in possession" is distinguished from "in remainder" and "in reversion." (*Per* North, J., in *Re Morgan*, 24 Ch. D. 114; where, however, some confusion seems to have prevailed between a tenant in fee simple subject to an executory limitation, and a person who may at some future time, by virtue of an executory limitation, become a tenant in fee simple.) The section applies to persons in possession, though under disability. (*Ibid.*)

It is conceived that any act done by a person having the powers of a tenant for life, which does not expressly purport to be done in exercise of his statutory powers, but is within their scope, will be taken to have been done in exercise of the powers; because a contract, conveyance, or other assurance cannot be presumed to have been intended to be made *ultra vires*, and the existence of the statutory powers is sufficiently notorious to raise a presumption that they were present to the minds of the parties to the deed.

(i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

A tenant in tail in possession who is *sui juris*, unless the remainder or reversion on his estate tail is vested in the Crown, or

S.L.A. 1882, Sect. 58.

unless he is restrained by some special Act of Parliament, can defeat the entail, and vest in himself a fee simple, or any other estate not greater (Challis, R. P. 254) than the estate of the settlor who created the entail, by virtue of the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74. The operation of the present enactment will probably be almost confined in practice to tenants in tail who are under some disability, either at common law or by statute. As to the disability of infancy, see s. 60, p. 291, *post*. As to marriage, see s. 61, p. 292, *post*. As to lunacy, see s. 62, p. 294, *post*.

If the remainder or reversion is vested in the Crown, the tenant in tail could not, at common law, defeat the estate of the Crown by suffering a common recovery, though he might thereby bar the claim of the issue in tail and create a base fee. (Challis, R. P. 266, No. 5 of the list there given.) But by the "Act to embar feigned recovery of lands wherein the King is in reversion" (34 & 35 Hen. 8, c. 20), s. 2, recoveries suffered by such tenants in tail were made void as against the heirs in tail. Such tenants in tail also cannot make any disposition under the Fines and Recoveries Act; see s. 18 thereof. (See further as to the 34 & 35 Hen. 8, c. 20, the note on sub-division iii., *infra*.)

In many private Acts of Parliament obtained for the purpose of settling lands held by a settlor, or person on whose behalf the settlement is obtained, for a fee simple, a special clause is inserted to restrain any tenant in tail under the settlement from defeating the entail by virtue of the powers given to tenants in tail by the Fines and Recoveries Act.

But for the express provision contained in the present enactment, it is conceived that neither tenants in tail restrained by the Act to embar Feigned Recoveries, nor those restrained by special provisions contained in private Acts, would have been able to exercise the powers of tenant for life under the present Act.

In the eye of the common law, lands given to a subject for an estate tail, the Crown retaining the reversion within the meaning of the 34 & 35 Hen. 8, c. 20, were viewed in much the same light as the lands given in more modern times out of moneys provided by Parliament, in reward of public services; which last alone are now protected from alienation, &c., by the tenant in tail for the time being. It seems doubtful whether the Marlborough estates come within this last description, since they were settled by statute at the request of the first Duke, who was at the time actually seised in fee simple. (*Davis* v. *Duke of Marlborough*, 1 Swanst. 74, at p. 82.) See further, as to the Honour and Manor of Woodstock and the Hundred of Wootton, 3 & 4 Anne, c. 6; 5 Anne, c. 3; *Att.-Gen.* v. *Duke of Marlborough*, 3 Madd. 498. These, moreover, were not, properly speaking, purchased with money provided by Parliament, but, being the property of the Crown, were, with the assent of Parliament, granted to the Duke. As to Strathfieldsaye, see 54 Geo. 3, c. 161.

It has been held by Chitty, J., in *Re Sir J. Rivett-Carnac's Will*, 30 Ch. D. 136, that under the limitation of a baronetcy to a grantee and the heirs male of his body, without any place being named in connection with the dignity, the baronet for the

time being is tenant in tail of the dignity. See further on this case, note on s. 37, at p. 258, *ante*. S.L.A. 1882, Sect. 58.

(ii.) A tenant in fee simple, with an executory limitation, gift or disposition over, on failure of his issue, or in any other event:

See the Conv. Act, 1882, s. 10, p. 178, *ante*, as to the avoidance of an executory limitation, which is in defeasance of a fee simple on failure of issue, so soon as any issue of the prescribed class shall have attained the age of twenty-one years.

In the present enactment the words "gift or disposition" seem to be tautologous. They probably refer to executory devises, which are included among executory limitations.

The language of the above-cited section of the Conv. Act, 1882, "on default or failure of all or any of his issue, whether within or at any specified period of time or not," is, so far as the issue are concerned, wider than that of the present enactment. It does not clearly appear that the present enactment applies where the defeasance is upon anything but a *total* default or failure of issue; but perhaps this may be imported by the words, "or in any other event." The restriction within the period prescribed by the rule against perpetuities must be implied, because the executory limitations referred to would otherwise be void *ab initio*.

(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

On base fees generally, see Challis, R. P., Chap. XXII., pp. 264—272.

The above-mentioned Act to embar Feigned Recoveries (34 Hen. 8, c. 20) made it impossible in England for any estate tail upon which the Crown had a remainder or reversion within the meaning of that Act, to be turned to a base fee by fine or recovery. But the remainders and reversions there contemplated are only those subsisting upon estates tail created by the Crown by way of *provision or gift in reward of meritorious service* done by its subjects: not such as accrued to the Crown in any other manner. (See Co. Litt. 372 b, 373 a, where that Act is exhaustively discussed.) If the reversion was once severed from the Crown, and taken back again, it was no longer within the protection of the statute. (*Earl of Chesterfield's Case*, Hardr. 409.) The Act did not extend to Ireland. (Lord Nott. MSS., cited Butl. n. 3, on Co. Litt. 372 b.) Therefore in England base fees upon which the reversion is in the Crown, must either be of older creation than the 34th of Hen. 8, or else must have had their origin by methods not within the purview of the Act, which have long been wholly disused in practice. If at this day there are in England any such base fees, it is not probable that they are known to exist. But such base fees

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undoubtedly exist in Ireland, where no obstacle was opposed to their creation.

Lord Coke (*ubi supra*) expressly mentions that fines were as much within the above-cited Act as recoveries.

The present enactment, like sub-division (i.), *supra*, makes no mention of remainders. It is probable that no such remainders are known to exist in England. Stat. West. 2, c. 3, speaks only of reversions, but extends also to remainders. (Co. Litt. 280 b.)

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

The phrase "determinable on life," seems to mean "determinable on the dropping of a life or lives;" that is, it means, in fact, determinable on death.

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

A purchaser of the whole estate of a tenant for life under a settlement would be a tenant for the life of another, and would not hold "merely under a lease at a rent." It will probably be held that s. 50, sub-s. (1), p. 274, *ante*, notwithstanding the present enactment, prevents such a purchaser from exercising the statutory powers.

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

There is nothing in this provision to except from its operation such tenants as hold "merely under a lease at a rent;" and if it is to be construed strictly, every lessee for life or lives whose lease contains any condition of forfeiture (or, perhaps, even if it contains none, since waste operates a forfeiture at common law) will now have the statutory powers of a tenant for life in respect of the land comprised in his lease. To avoid this absurdity, the provision will probably be construed somewhat loosely.

"Conditional limitation" seems here to be restricted to mean only what may more conveniently be styled a determinable limitation at common law. (Challis, R. P. 198, 199.) The phrase is sometimes used to include also executory limitations and contingent remainders. But here the former are

explicitly mentioned, and the latter are excluded by the nature of the context. S.L.A. 1882, Sect. 58.

A person entitled for life to the rent reserved on a lease derived out of a settled estate, is not a tenant for life of the settled estate within the meaning of the Act. (*Re Hazle's Settled Estates*, 26 Ch. D. 428.)

(vii.) A tenant in tail after possibility of issue extinct:

As to the origin of such tenancy, see Challis, R. P. 234. Such tenant in tail is not at common law impeachable for waste, though his assigns are. He could not suffer a common recovery, and cannot now bar the entail under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74. See s. 18 thereof.

(viii.) A tenant by the curtesy:

See S. L. Act, 1884, s. 8, and note thereon, p. 308, *post*.

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

The person who would be entitled to the surplus income, if there were any, has the statutory powers of a tenant for life, although the whole income is in fact exhausted by charges, &c. (*Re Jones*, 26 Ch. D. 736; *Re Cookes' Settled Estates*, W. N. 1885, p. 177.)

As to a discretionary trust for payment of rents and profits among a class, see *Re Atkinson*, *Atkinson* v. *Bruce*, 31 Ch. D. 577; and see note on s. 2, sub-s. (6), p. 187, *ante*.

Where a testator directed his trustees to manage his estates for twenty years, and to accumulate the surplus rents, and at the end of that period to settle the estates and accumulations on the trusts of another settlement under which the testator's son was then a tenant for life, it was held that the testator's son had not the powers of a tenant for life as regards the estates devised by the will during the continuance of the trust for accumulation. (*Re Strangways*, *Hickley* v. *Strangways*, 34 Ch. D. 423.)

But where a testator created a long term in his estates, and directed his trustees to pay certain annuities, and to apply the surplus rents in discharging incumbrances, and subject thereto devised his estates to one for life, it was held that the devisee for life had the powers of a tenant for life, because the charges might be redeemed at any moment. (*Re Clitheroe Estate*, 31 Ch. D. 135.)

If there is an absolute gift to an infant, contingently upon his

S.L.A. 1882, Sect. 58.

attaining a certain age, he has not the powers of a tenant for life pending the contingency. (*Re Horne's Settled Estate*, 39 Ch. D. 84; which must be taken to have overruled *Re Powell, Allaway* v. *Oakley*, W. N. 1884, p. 67, unless in the latter case the gift to the infants was taken to be vested, and not contingent.)

Repairs of buildings on a settled estate, and of the chancel of a church, are "expenses of management" within the meaning of this clause. (*Re Bentley, Wade* v. *Wilson* (No. 2), 33 W. R. 610.)

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

See S. L. Act, 1884, s. 8, and note thereon, p. 308, *post*.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

XIV.—Infants; Married Women; Lunatics.

Sect. 59. Infant absolutely entitled to be as tenant for life.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

Sect. 42 of the Conv. Act, 1881, p. 110, *ante*, provides for the management of infants' land, and gives to trustees power to enter into possession thereof. Its language suggests that, after such entry, the infant can no longer be said to be "beneficially entitled to the possession of" the land. The language of the present section, which varies from that of s. 2, sub-s. (5), p. 186, *ante*, and may be compared with that of the Conv. Act, 1881, s. 41, p. 109, *ante*, was apparently designed to remove any doubt whether, after entry by the trustees, the infant's title to possession would be such as to bring him within the meaning of this section.

An executory limitation, so long as it remains executory, does not interfere with the seisin of the person who is seised subject thereto. An infant devisee of land will therefore come within this section, although the devise is subject to a gift over in case of his death before attaining twenty-one years.

S.L.A. 1882, Sect. 59.

When there is occasion to give an "acknowledgment" for production, &c., of deeds (see the Conv. Act, 1881, s. 9, p. 36, *ante*) on the sale of an infant's land, the question may arise, whether the trustees have any authority to give such "acknowledgment;" and, if they have, whether they should do so in their own name or in that of the infant. Since the power, or capacity, to give "acknowledgments," is not one of the "powers of a tenant for life under this Act," it does not seem to be conferred upon the trustees by s. 60; and there does not seem to be anything in s. 20, p. 218, *ante*, to confer it upon them. And since, under s. 60, the trustees exercise powers on behalf of the infant, it would seem that, if they can give "acknowledgments," they should do so on the infant's behalf, as his statutory agents.

An infant who has a vested equitable estate in land, liable to be devested on death under the age of twenty-one years, is a tenant for life within the meaning of the Act. (*Re James*, W. N. 1884, p. 172; 32 W. R. 898.) But not if he has a contingent estate. (*Re Horne's Settled Estate*, 39 Ch. D. 84.)

If trustees are appointed under the Act for the purpose of selling an infant's lands, the estate being administered by the Court, the sales may be directed to be made out of Court. (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552.)

It is doubtful whether this section properly extends to leaseholds. (See note on the Conv. Act, 1881, s. 2, sub-s. ii., p. 2, *ante*.) The language of the present section suggests, that the antithesis implied in the use of the terms "seised of" and "entitled in possession to," is not between *freehold* and *leasehold*, but between *legal* and *equitable* estates. But it is not improbable that leaseholds will be somehow brought within its operation.

This section provides for a much more liberal dealing with infants' lands than the Court has ever exercised under its ordinary jurisdiction. (See *Re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 786.)

As to infant married women, see note on s. 61, *post*.

In cases of partnership, where real estate belonging to the partnership is held to be converted in equity and to go to the next of kin of a partner dying intestate (as to which, see Lindley on Partnership, bk. iii. ch. 5, s. 1), all or some of whom are infants, the Court has jurisdiction, while the property remains in fact unconverted, to appoint trustees for purposes of the Act so far as the shares of infants are concerned. (*Re Wells*, W. N. 1883, p. 111; 31 W. R. 764.)

Sect. 60. Tenant for life, infant.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the

S.L.A. 1882, Sect. 60. Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

As to consents to be given on behalf of infants, to the exercise of powers conferred by settlement on the trustees, see note on s. 2, sub-s. (5), p. 186, *ante*. The consent of the testamentary guardians of the infant is not required. (*Re Duke of Newcastle's Estates*, 24 Ch. D. 129, at p. 142.)

As to the completion of contracts where the "successor in title" of the person contracting is an infant, see note on s. 31, sub-s. (2), at p. 248, *ante*.

The exercise of statutory powers should be expressed to be done on the infant's behalf; since the powers remain vested in the infant, though, by virtue of this section, they may be exercised by the trustees.

Perhaps the words, "would, if he were of full age, be a tenant for life," &c., include the case of an infant who is contingently entitled to an estate for life, or in tail, on attaining the age of twenty-one years. But it is not clear that the trustees could exercise any powers "on his behalf," since he would not have any to exercise. And it does not appear that the language of the section could upon any construction include the case of an infant who is contingently entitled on attaining any greater age.

In *Re Greenville Estate*, 11 L. R. Ir. 138, the Court refused to appoint the uncle of an infant absolutely entitled to an undivided share, who was also a co-owner with the infant, to exercise on the infant's behalf the power of concurring in a sale of the entirety. An independent person, not a relation, was ultimately appointed; and the infant's share of the purchase-money was ordered to be paid into Court.

Trustees, acting in the place of an infant tenant for life, who have previously obtained from the Court powers under the Settled Estates Act, 1877, must apply by petition to stay the operation of the order before exercising the powers conferred by the S. L. Act. (*Re Poole's Settled Estates*, 32 W. R. 956.)

It has been held that where trustees have been appointed under this section for the purpose of exercising the powers of an infant tenant for life, it is not necessary to appoint other trustees under s. 38, p. 259, *ante*, for the purpose of receiving the notices referred to in s. 45, p. 267, *ante*, as amended by the S. L. Act, 1884, s. 5, p. 303, *post*. (*Re Countess of Dudley's Contract*, 35 Ch. D. 338.)

The Court has jurisdiction to authorize trustees appointed under this section to sell the land out of Court. (*Re Price, Leighton* v. *Price*, 27 Ch. D. 552.)

For form of summons applicable to this section, see Appendix to the S. L. Act Rules, 1882, Form XXII., p. 385, *post*.

Sect. 61. Married woman, how to be affected. **61.**—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

(2.) Where a married woman who, if she had not

S.L.A. 1882, Sect. 61.

been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

As any conveyance made by a married woman under this Act would be in the nature of the exercise of a statutory power, and would not be a conveyance under the Fines and Recoveries Act, it is conceived that separate acknowledgment is not necessary.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

This section seems by inadvertence to have omitted to include the case of an infant married woman. Sect. 60, p. 291, *ante*, is undoubtedly among the "foregoing provisions," which by virtue of sub-s. (1) of the present section "do not apply" to her. These foregoing provisions are brought back, by sub-sects. (2) and (3) of the present section, so far as they confer powers upon a tenant for life; but s. 60 cannot be brought under this description. It will be necessary to hold that s. 60 is incorporated by sub-s. (4) of the present section, as being a "provision . . . . referring to a tenant for life," though that construction presents considerable difficulty. In cases where the powers are exerciseable by the wife and husband together, the difficulty may perhaps prove to be insuperable. Sect. 60 applies only where the "person having the powers of a tenant for life is an infant;" and in this case such person is constituted by, or

S.L.A. 1882, Sect. 61. composed of, the wife and husband jointly, who do not together constitute or compose "an infant."

Sect. 62. Tenant for life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

The committee of a lunatic tenant for life must obtain authority from the Court in Lunacy before giving notice of intention to exercise the statutory powers. (*Re Ray's Settled Estates*, 25 Ch. D. 464.)

This section does not provide for the case of a lunatic married woman, who is not entitled either to her separate use by contract, or as a *feme sole* by virtue of the Married Women's Property Act, 1882; or for the case of such a married woman having a lunatic husband. It will probably be held that in either case the committee may act on behalf of the lunatic, as in this section prescribed.

If the lunatic has not been so found by inquisition, the powers conferred by the Act cannot be exercised; unless he is an infant, in which case it is conceived that s. 60, p. 291, *ante*, will apply.

It appears that, under s. 124 of the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), an order cannot be made for the sale of a lunatic's undivided shares of land to the owner of the other shares. See *Re Weld*, 28 Ch. D. 514. But such an order can be made under the present section. *Re Gaitskell*, 40 Ch. D. 416, where the Court refused to sanction the particular contract proposed, for want of sufficient information, but gave leave in general terms to sell to the co-owner.

Sect. 63. Provision for case of trust to sell and re-invest in land. [*The section contains nothing about trusts to re-invest in land.*]

XV.—Settlement by way of Trusts for Sale.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust

S.L.A. 1882, Sect. 63.

or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

See now the S. L. Act, 1884, sects. 6, 7, pp. 304 *et seq.*, *post*. The practical effect of this enactment, taken in connection with the present section, is that absolute trusts for sale can be executed by trustees in the same manner as before the passing of the S. L. Act, 1882; but the tenant for life, under the present section, may, if dissatisfied with the action of the trustees, apply to the Court for leave to exercise the statutory powers, after which, if leave should be granted, the powers of the trustees will be suspended, and they will stand only in the position of trustees of the settlement for the purposes of the Act.

It was probably necessary to extend the provisions of the Act so as to include land given upon trust for sale; because the Act might otherwise have had no effect beyond altering the common form of settlements. The general result is to extend the provisions of the Act to an immense number of wills and other settlements, comprising trifling properties in lands, which would otherwise have been outside its scope.

S.L.A. 1882, Sect. 63.

If an estate is given in trust for sale, and to maintain infants out of the income, and accumulate the residue for their benefit, they are tenants for life within this section. (*Re Powell, Allaway* v. *Oakley*, W. N. 1884, p. 67.) It is conceived that, in this case, the learned judge must have supposed the gift of the intermediate income to the children to have been vested, not contingent; otherwise, the case would seem to have been overruled by *Re Horne's Settled Estate*, 39 Ch. D. 84.

In order that land under this section may be settled land, the following conditions must concur. There must be—

(1) A trust or direction for sale;

(2) And for the application of the sale money,
or, of the income of such money,
or, of the income of the land till sale,
or, of any part thereof respectively;

(3) for the benefit of some person or persons for life, or for any other limited period.

In order to make sense of the subsequent provisions, it is necessary, after the words "shall be deemed to be a settlement," to insert the words, "so far as it relates to the whole or any such part of the income, &c., as aforesaid;" because, by the literal construction of the section, the tenant for life of a tenth share of the income seems to be tenant for life of the whole of the "land, estate, or interest aforesaid;" unless the alternative should be preferred of supposing the words "beneficially entitled to the income," to mean *the whole* income; upon which last hypothesis there would be no tenant for life at all, so long as the persons for the time being entitled to the income are not entitled to the whole.

The tenant for life for the time being must be ascertained only from the provisions of the instrument under which the trust arises; and if, under its provisions, there is no person for the time being beneficially entitled to the income of the land until sale, there is no tenant for life. The trustees, even before the enactment of the Act of 1884, could have executed such a trust for sale vested in them, without obtaining any consent thereto. (*Re Earle & Webster's Contract*, 24 Ch. D. 144.)

The tenant for life under this section, is not the person who will be entitled for life to the income of the proceeds of sale, but the person who is beneficially entitled to the income of the land until sale. If the instrument should make a tenant for life of the income of the proceeds of sale, without disposing of the income of the land until sale, there is, strictly speaking, no tenant for life; but by implication the person entitled to the income of the proceeds of real estate is in such a case taken to be entitled to the income until sale. (*Hutcheon* v. *Mannington*, 1 Ves. 366, at p. 367; *Casamajor* v. *Strode*, 19 Ves. note, p. 392; *Re Laing*, L. R. 1 Eq. 416.) The rule as to personalty is different; and the income and corpus are apportioned on the principle laid down in *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; which extends also to cases of contingent reversionary interests in personalty. (See *Re Hobson, Walker* v. *Appach*, W. N. 1885, p. 184; 34 W. R. 70.)

Before the coming into operation of s. 6 of the Act of 1884,

S.L.A. 1882, Sect. 63.

p. 304, *post*, it would seem that the tenant for life of any fraction of the intermediate income might have put a *veto* upon a sale; and, in such cases, there would have been no jurisdiction to order a partition among the claimants of different fractions, there being an existing trust for sale. (*Biggs* v. *Peacock*, 22 Ch. D. 284.)

The question may arise whether the word "part" means only an aliquot fractional part, or whether it includes a fixed nominal amount payable by way of annuity.

It would also seem that, during such time as a trust for accumulation extends to the whole income, there is no tenant for life under the present section, there being no person who is "*for the time being* beneficially entitled" to anything. This seems to follow, by parity of reasoning, from *Re Strangways, Hickley* v. *Strangways*, 34 Ch. D. 423; see p. 289, *ante*.

A purchaser from trustees, who is aware of the existence of a trust, must ascertain that no order, giving leave to the tenant for life to exercise the statutory powers, has been registered as a *lis pendens* under the S. L. Act, 1884, s. 7, sub-s. (v.), p. 307, *post*, in order that he may obtain the protection afforded by sub-s. (vi.).

Whenever a purchaser has reason to suspect that he is purchasing from trustees, he should inquire whether there exists any declaration of trust affecting the property. But whether a purchaser, not having notice *aliunde* of a trust, could compel an answer to such inquiry, is doubtful. The mere fact that vendors are joint tenants will not of itself, in the absence of other circumstances, suffice to affect a purchaser with constructive notice of a trust. (See *Harman and Uxbridge, &c. Railway*, 24 Ch. D. 720.) But their refusal to enter into covenants for title would probably be held to amount to such notice. (See *Boursot* v. *Savage*, L. R. 2 Eq. 134.)

It is conceived that solicitors ought now to place such declarations of trust upon the Abstract of Title. If it should be held that purchasers can compel an answer to the above-mentioned inquiry, this will become a plain duty.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise

S.L.A. 1882, Sect. 63.

in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by

reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging. S.L.A. 1882, Sect. 63.

XVI.—Repeals.

64.—(1.) The enactments described in the schedule to this Act are hereby repealed. Sect. 64. Repeal of enactments in schedule.

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

This section repeals such part of Lord Cranworth's Act as was not repealed by the Conv. Act, 1881; removes certain impediments to the exercise of the powers given by the Improvement of Land Act, 1864, for the purpose of borrowing money for improvements; and repeals the Settled Estates Act, 1877, s. 17, which is superseded by s. 36, p. 255, *ante*.

XVII.—Ireland.

65.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided. Sect. 65. Modifications respecting Ireland.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for

S.L.A. 1882, Sect. 65.

Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

40 & 41 Vict. c. 57.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

40 & 41 Vict. c. 56.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

Section 64

REPEALS.

23 & 24 Vict. c. 145. in part.	An Act to give to trustees, mortgagees, and others, certain powers now commonly inserted in settlements, mortgages, and wills	in part; namely,— Parts I. and IV. (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).
27 & 28 Vict. c. 114. in part.	The Improvement of Land Act, 1864.....	in part; namely,— Sections seventeen and eighteen: Section twenty-one, from "either by a party" to "benefice) or" (inclusive); and from "or if the landowner" to "minor or minors" (inclusive); and "or circumstance" (twice): Except as regards Scotland.
40 & 41 Vict. c. 18. in part.	The Settled Estates Act, 1877	in part; namely,— Section seventeen.

THE SETTLED LAND ACT, 1884.

47 & 48 Vict. c. 18.

An Act to amend the Settled Land Act, 1882.

[3rd July, 1884.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Sect. 1. Short title.

1. This Act may be cited as the Settled Land Act, 1884.

Sect. 2. Interpretation.

2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.

Sect. 3. Construction of Act.

3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

Sect. 4. Fine on a lease to be capital money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

As to fines, see note on S. L. Act, 1882, s. 7, p. 200, *ante*.

No distinction seems to be drawn by s. 11 of the Act of 1882, p. 205, *ante*, with regard to rent reserved in a mining lease, between such part as may be reserved in respect of surface occupied, and such part as may be reserved in respect of the minerals. To make any such distinction might probably open a door to evasion.

S.L.A. 1884, Sect. 5.

Notice under 45 & 46 Vict. c. 38, s. 45, may, as to a sale, exchange, partition, or lease, be general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

This enactment practically repeals s. 45, p. 267, *ante*, so far as sales, exchanges, partitions, and leases, are concerned. It will probably become a common practice for a tenant for life to give a general notice once for all, upon entering into possession.

The necessity for specific notice was, in many cases, highly inconvenient in practice, so far as leases were concerned. The present enactment will be useful, in respect of settled estates consisting of building estates and large collections of house property. With respect to sales, exchanges, and partitions, the gain in convenience to the tenant for life does not seem adequately to compensate the loss of security to the remainderman, with whose property the tenant for life is dealing. A case of *Re Sabin's Settled Estates*, W. N. 1885, p. 197, referred to p. 203, *ante*, supplies an example of the danger which might arise.

It is superfluous to inquire whether enfranchisements are included under sales; because, if they are not, then they are not within s. 45 of the Act of 1882.

There seems to be nothing to render necessary a renewal of the notice, upon the death of any, or all, of the trustees to whom the original notice was given. This may, perhaps, be due to oversight; since it is plainly repugnant to the policy of s. 45, sub-s. (2), p. 268, *ante*. And since notice to trustees is in general a personal notice only (see *Hallows* v. *Lloyd*, 39 Ch. D. 686), it would be more proper, and more safe, for the tenant for life to renew the notice upon every appointment of a new trustee; and a purchaser, &c., ought still, as formerly, to ascertain the existence of trustees for the purposes of the Act.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

The words "from time to time" seem to be connected with "required by him," not with the word "furnish." It therefore seems that the trustee's "request" must be definite or specific; and that the tenant for life is only bound to supply information with reference to transactions "effected, or in progress, or immediately intended," at the time when he actually receives it. But there seems to be nothing to prevent a trustee from sending a periodical request, couched in identical language.

It does not appear what would be the consequences if the tenant for life should neglect or refuse to answer the trustee's questions. There seems to be no jurisdiction in the Court to order him to answer interrogatories upon oath; and, apparently, the only

S.L.A. 1884, Sect. 5.

remedy would be the somewhat violent one of restraining him by injunction from exercising any of his statutory powers.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

The notice, or rather the giving of the notice, may be waived by a trustee, even after a final contract has been entered into by a tenant for life; and even though the trustee has not been appointed until after the execution of the contract. (*Hatten* v. *Russell*, 38 Ch. D. 334.)

It does not appear that even all the trustees together have any authority to waive the notice directed by s. 45, sub-s. (1), of the Act of 1882, p. 267, *ante*, to be given to the "solicitor for the trustees." This conclusion could be arrived at only by giving to the word "notice," in the present sub-section, a meaning which would enable a single trustee to waive the giving of notice to all the trustees. Moreover, the notice to the solicitor seems to have been intended rather for the protection of the inheritance than for the information of the trustees.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

Sect. 6. As to consents of tenants for life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

This sub-section practically confirms, and extends to all settlements made by way of trust for sale, the doctrine laid down by Pearson, J., in *Taylor* v. *Poncia*, 25 Ch. D. 646; namely, that an absolute trust for sale may be exercised without the consent of the statutory tenant or tenants for life. Since in that case the sale was conducted under an order of the Court, which had been made in exercise of a jurisdiction which in no way depended upon s. 63 of the Act of 1882, there could be no doubt about the power of the Court to supersede all questions relating to consents which might be necessary to sales made under that section. The above-stated rule was, therefore, not strictly material to the decision in that case. That doctrine, if it had not been open to the suspicion

S.L.A. 1884, Sect. 6.

of amending rather than interpreting the language of the Act, would have partly removed a serious practical inconvenience, which has now been completely removed by the present sub-section. In *Taylor* v. *Poncia*, the trust in question was an absolute trust. This sub-section applies also to discretionary trusts and powers, provided that they are annexed to a trust for sale.

See also the first note on s. 7, *post*.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercise-able for any purpose provided for in that Act.

In the case of ordinary settlements, where the tenant for life happens to consist of more than one person, powers given to trustees can be exercised more easily under this sub-section than under the provisions of the Act of 1882. This may, perhaps, afford a reason for sometimes retaining in modern settlements the old express powers of trustees.

A question may, perhaps, arise as to the proper form of the covenants for title in conveyances made under this sub-section, where only one out of several tenants for life has consented. It is the practice for tenants for life, whether legal or equitable, whose consent is necessary to a sale, to covenant for title; as to which, see *Re London Bridge Act*, 13 Sim. 176; *Earl Poulett* v. *Hood*, L. R. 5 Eq. 115; *Re Sawyer and Baring's Contract*, W. N. 1884, p. 192, 33 W. R. 26. It is conceived that the covenants of the consenting fraction of a tenant for life should be restricted to his own share.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

Sect. 7. Powers given by s. 63 to be exercised only with leave of the Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

The effect of this section in conjunction with s. 6, sub-s. (1), *supra*, is to remove several objections to the practical working of s. 63 of the Act of 1882, p. 294, *ante*.

(1.) A sale can now be effected under a trust for sale, without

S.L.A. 1884, Sect. 7.

putting the trusts of the purchase-money upon the title to the lands.

(2.) In cases where the statutory tenant for life has obtained an order authorizing him to exercise the statutory powers, the order alone is put upon the title. The effect of sub-s. (ix.), *infra*, seems to be, to make the order conclusive evidence as to his title to exercise the powers.

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

It would appear that leave can be given only to the person or persons who, under s. 63 of the Act of 1882, could have exercised the powers as tenant for life. This present section does not deal with the statutory powers in general, but only with the powers conferred by s. 63 of the former Act. It does not appear that leave could be given to one, or less than the whole, of the persons constituting such tenant for life, when they are more than one. The language of sub-s. (vii.), *infra*, would suggest that leave can be given only to the whole.

It is clear, from sub-s. (vii.), *infra*, that no order can be made, except upon the application of all the persons constituting the tenant for life; though, by sub-s. (viii.), when an order has once been made, it may be varied or rescinded upon the application of any person interested. Such applications might become necessary, if one of two tenants in common, "having the leave," should become lunatic; or if it is found that the statutory powers are being improperly exercised.

(iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

After any such order has been made, but before its registra-

tion as a *lis pendens*, any exercise by the trustees of any power affected by the order seems to be improper but not invalid; see sub-s. (vi.), *infra*.

It is submitted that such order ought to be expressed to be subject to any contract previously made by the trustees, which is known to exist. It is, however, conceived that, if any such contract should be passed over in silence, the order would not prevent it from being carried into effect.

(v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

A purchaser, &c., dealing with a "person having the leave," should require the order to be duly registered, before completion of the transaction, if this has not already been done.

(vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

The object of this sub-section is to enable persons safely to "deal from time to time" with the trustees, so long as no order is registered.

(vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

(viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section

S.L.A. 1884, Sect. 7.

sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

It is conceived that the effect of this sub-section is only to relieve persons dealing with a tenant for life, who has obtained an order, from inquiring into his title, not to authorize the Court to give leave to any person other than the person or persons specified in s. 63 of the Act of 1882, p. 294, *ante*, to exercise the statutory powers. That is to say, the adjudication of the Court upon his title under the settlement is conclusive, but the Court is bound to adjudicate upon such title.

(x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

Sect. 8. Curtesy to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

The "title of proceedings" given in Form I. in the Appendix to the Settled Land Act Rules, 1882, at p. 378, *post*, may be adapted to cases arising under this section, as follows :—

In the Matter of certain lands known as , situate at , in the county of , being a settled estate within the meaning of the Settled Land Act, 1884, s. 8, by reason of the death, on the day of , 18 , of A. B., late the wife of C. D., of , leaving the said C. D. tenant by the curtesy of the said lands.
And in the Matter of the Settled Land Acts, 1882 and 1884.

This section removes certain difficulties arising on s. 58, sub-s. (1) (viii.), of the Settled Land Act, 1882, at p. 289, *ante*. Under the latter section, since tenancy by the curtesy arises by the common law or special custom, there is, strictly speaking, no "instrument" within the meaning of s. 58, sub-s. (2). Some ambiguity seems to remain, by reason of the omission to state either (1) the time at which the settlement shall be deemed to have been made by the wife; or (2) what estate or estates shall be deemed to be comprised in it.

(1) The estate of tenant by the curtesy does not, for all purposes, commence with the death of the wife, but, for some purposes, with the birth of issue inheritable, after which event the husband alone was entitled to the homage of the tenants of his wife's manor. (Co. Litt. 67 a.) Lord Coke also cites the decision in 29 Edw. 3, that a tenant by the curtesy cannot claim by devise and waive his tenancy by the curtesy, "because, saith the booke, *the freehold commenced in him before the devise* for

terme of his life." (Co. Litt. 30 a.) It is probable that, for the purposes of the present enactment, the tenancy will be held to commence at the wife's death, and that the settlement will be deemed to have been then made. S.L.A. 1884, Sect. 8.

(2) The only estate which is, by the enactment, expressed to be comprised in the supposed settlement, is the estate of the tenant by the curtesy himself. It will probably be held that assurances made by the tenant by the curtesy, in exercise of the statutory powers, may extend over such estate as descends from the wife to her heir.

These points ought to have been explicitly dealt with by this Act. They will have to be settled by judicial decision before purchasers can safely be advised to accept titles depending upon the statutory powers of a tenant by the curtesy.

THE

SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

50 & 51 Vict. c. 30.

An Act to amend the Settled Land Act (1882).

[23rd August, 1887.]

45 & 46 Vict. c. 38.

Whereas by the twenty-first section of the Settled Land Act, 1882 (in this Act referred to as the Act of 1882), it is provided that capital money arising under that Act may be applied in payment for any improvement by that Act authorized:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Amendment of s. 21 of the Settled Land Act, 1882.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be ap-

plied in payment for an improvement authorized by the Act of 1882.

S.L.A., &c., 1887, Sect. 1.

It has been held that, in applying capital money in discharge of periodical payments charged upon land under a drainage scheme, the whole amount of each periodical payment cannot be discharged out of capital, but that an apportionment must be made to ascertain what part of each such payment is attributable to interest and what part to capital, and that only the latter can be paid out of capital money. (*Re Lord Sudeley's Settled Estates*, 37 Ch. D. 123.) But it is to be noted that in this case the tenant for life practically waived his right, if any, to payment of the whole of the instalments out of capital.

If this decision is correct, it follows by parity of reasoning that on the redemption of such periodical payments for a lump sum a similar apportionment must be made. This conclusion accords very ill with the language of the Act. And it would seem also to follow that, when applying capital money "in payment for an improvement authorized by the Act of 1882," by virtue of s. 21, sub-s. (iii.), of that Act, p. 226, *ante*, a similar apportionment would have to be made, which would amount to a *reductio ad absurdum*.

Such periodical payments, when not perpetual, cannot, in ordinary cases, be compulsorily redeemed; and it is not unusual to require a bonus for consenting to the redemption. It is doubtful whether capital moneys could be properly applied in payment of any such bonus.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

Sect. 2. Sect. 28 of Settled Land Act, 1882, to apply to improvements within preceding section.

See S. L. A. 1882, s. 28, p. 241, *ante*.

3. This Act shall be construed as one with the Settled Land Act, 1882, and the Settled Land Act, 1884, and may be cited together with those Acts as the Settled Land Acts, 1882 to 1887, and separately as the Settled Land Acts (Amendment) Act, 1887.

Sect. 3. Short title.

THE TRUSTEE ACT, 1888.

51 & 52 Vict. c. 59.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees.

[24th December, 1888.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows; that is to say,

Sect. 1. Short title, extent, and definition.

1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

This appears not to include an executor *de son tort*, or any person who is in possession of trust property of which he ought not to be in possession, and who, by reason of such possession, is fixed with the liabilities of a trustee by courts of equity. For example, it is at least doubtful whether a solicitor who deals on his own account with trust funds coming to his hands, would obtain any protection in his dealings from the Act.

The sub-section appears to contemplate only persons who, being lawfully in possession of and dealing with property, are affected with a trust by reason of something other than the express declaration of a settlor. It does not seem to include persons who, by their own acts, have improperly assumed the liabilities of

a trustee. The phrases, "trustee by construction of law," and "trustee by implication of law," are never applied to persons who are improperly in possession of trust funds. Trustee Act, 1888, Sect. 1.

But with regard to some of the Act's provisions, such as sects. 4 and 5, it would seem to be not unreasonable that, when holding a trustee *de son tort* liable, the Court should take into account the extent of what would have been his liability if he had been a lawful trustee, and should affect him only with the same measure of liability. The same remark would not apply to provisions for the indemnity of trustees who employ agents.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

2.—(1.) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration or property receivable by such trustee under the trust by permitting such solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in the fifty-sixth section of the Conveyancing and Law of Property Act, 1881; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by such solicitor shall have the same validity and effect, by virtue of the said fifty-sixth section, as the same would have had if the person appointing such solicitor had not been a trustee: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money, valuable consideration, or property to remain in the hands or under the control of the solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustee.

Sect. 2. Receipt of money by solicitor as agent.

44 & 45 Vict. c. 41.

The effect of this sub-section seems to be, to place payments made to a solicitor on behalf of trustees upon the same footing, so far as the validity of the discharge is concerned, as any other payments made to a solicitor by virtue of s. 56 of the Conv. Act, 1881, as to which, see note thereon, p. 133, *ante*.

"By reason *only* of his having made or concurred in making any such appointment": the word *only* seems to be emphatic.

Trustee Act, 1888, Sect. 2.

The trustee is bound to exercise reasonable discretion in choosing a solicitor worthy of the confidence to be reposed in him.

(2.) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance by permitting such banker or solicitor to have the custody of and to produce such policy of assurance with a receipt signed by such trustee, and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits such money to remain in the hands or under the control of the banker or solicitor appointed as aforesaid for a period longer than is reasonably necessary to enable such banker or solicitor to pay the same to the trustee.

This sub-section was not contained in the Bill as introduced by Lord Herschell. The draftsman appears to have copied the language of sub-s. (1), without attending to a material distinction. With regard to a solicitor producing a *deed*, s. 56 of the Conv. Act, 1881, had already made him, in general terms, an agent to receive payment, and that sub-section only removed a special exception to a general rule; but there exists no corresponding enactment relating to bankers, or to solicitors producing policies of assurance not under seal. It may be remarked that the principal assurance offices differ in their practice, some affixing the company's seal to policies, others affixing only the hands of specified officials. Probably the language will be held to contain within itself an authorisation to appoint agents by the summary method referred to.

As this sub-section does not incorporate the machinery of s. 56, above referred to, whereby the production of the receipt by the principal is made a sufficient authority for payment of the money, it follows, upon a strict construction, that the receipt must also be signed by the person producing the policy of assurance. This sub-section merely makes him an agent "to receive and give a discharge for" the money; and does not authorize him to "give" a discharge without signing, or otherwise authenticating, such discharge.

In this sub-section also the word *only* seems to be emphatic.

(3.) This section shall apply only where the money or valuable consideration or property is to be received after the passing of this Act.

Trustee Act, 1888, Sect. 3.

Depreciatory conditions on sales by trustees.

3.—(1.) No sale made by a trustee shall be impeached by any cestui que trust upon the ground that any of the conditions, subject to which the sale was made, may have been unnecessarily depreciatory, unless it shall also appear that the consideration for the sale was thereby rendered inadequate.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it shall appear that such purchaser was acting in collusion with such trustee at the time when the contract for such sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section shall apply only to sales made after the passing of this Act.

As to the aim of this section, and the restriction which it is intended to remove, see note on s. 3, sub-s. (11), of the Conv. Act, 1881, p. 13, *ante*.

The general effect seems to be as follows:—

(1.) The sale cannot now be impeached at all, unless the consideration is inadequate; that is, in effect, unless actual damage appears to have been incurred.

(2.) After the completion of the contract, the sale cannot be impeached as against the purchaser, unless he was colluding with the vendor at the inception of the contract.

(3.) As the completion of the contract will (in the absence of fraud in its inception) give the purchaser a secure title, so far as this particular objection is concerned, he is reasonably precluded from refusing to complete upon this ground.

Sect. 4.

Loans by trustees.

4.—(1.) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a

Trustee Act, 1888, Sect. 4.

person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in such report, and that the loan was made under the advice of such surveyor or valuer expressed in such report. And this section shall apply to a loan upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend.

This sub-section was intended to modify the rule adopted by courts of equity, that in lending money upon the security of buildings, not more than half their value must be lent. It also overrules certain objections taken to the method of valuation adopted by the trustees in *Fry* v. *Tapson*, 28 Ch. D. 268, by reason of their having appointed a valuer not resident in the locality.

In order that the trustee may obtain the protection of this section, the following conditions must be fulfilled:—

(1.) The trustee must obtain an independent report from a competent surveyor;

(2.) The report must state the market value of the property: it will not suffice to state the amount for which the valuer thinks the property a good security;

(3.) The trustee must act upon the faith of the report.

As to the phrase "able practical surveyor," see note on S. L. Act, 1882, s. 26, sub-s. 2 (ii.), p. 240, *ante*.

If the surveyor's fees are ultimately paid by the borrower, this circumstance must not be disclosed to the surveyor pending the preparation of his report; because this knowledge is considered to affect his independence.

As to the general duty of trustees in making investments, see *Re Whiteley*, *Whiteley* v. *Learoyd*, 33 Ch. D. 347; aff. in Dom. Proc. 12 App. Cas. 727.

(2.) No trustee lending money upon the security of any leasehold property shall be chargeable with breach of trust only upon the ground that in making such loan he dispensed, either wholly or partially, with the production or investigation of the lessor's title.

This provision has commonly been inserted in investment clauses which authorize the investment of trust money upon leaseholds. It is nevertheless doubtful whether the provision

would justify trustees in lending money upon beneficial leaseholds of recent date without any information, at least by way of general reputation, as to the lessor's title. Trustee Act, 1888, Sect. 4.

(3.) No trustee shall be chargeable with breach of trust only upon the ground that, in effecting the purchase of any property, or in lending money upon the security of any property, he shall have accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

Hitherto, upon a purchase of land, or an investment upon the security of land, by trustees, it has been (theoretically) their duty to require a good marketable title to be traced back for the legal period; which now, by the V. & P. Act, 1874, s. 1, is ordinarily forty years. Courts of Equity, however, have frequently sanctioned an investment upon less than a technically good marketable title. (See *Re Sheffield, &c. Railway Co.*, 1 Sm. & Giff. Appendix, p. iv.; *Meyrick* v. *Laws*, 34 Beav. 58, at p. 59.)

(4.) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

It is conceived that the language of this sub-section will be restricted to actions and proceedings having for their primary object the charging of a trustee in respect of a breach of trust; though its language seems wide enough to include any action having any relation, however remote from that primary object, to an investment; for example, administration actions not commenced for that object, foreclosure actions, &c.

5.—(1.) Where a trustee shall have improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. Sect. 5. Liability for loss by reason of improper investments.

This alters the previous rule of the Court, by which, in cases

Trustee Act, 1888, Sect. 5.

of improper investment, the trustees, if held liable at all, were disallowed the whole amount of the investment; that is to say, were charged with the whole loss. (See *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Bell* v. *Turner*, W. N. 1874, p. 113; *Re Whiteley, Whiteley* v. *Learoyd*, 33 Ch. D. 347; affirmed, 12 App. Cas. 727.)

(2.) This section shall apply to investments made as well before as after the passing of this Act, except where some action or other proceeding shall be pending with reference thereto at the passing of this Act.

See note on s. 4, sub-s. (4), p. 317, *ante*.

Sect. 6. Indemnity for breach of trust.

6.—(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act.

A *cestui que trust*, if *sui juris*, who consented to a breach of trust, was, independently of this act, liable to indemnify the trustees, who were of course primarily liable, to the extent of his interest. In *Sawyer* v. *Sawyer*, 28 Ch. D. 595, the Court seems to have stretched the law a good way, in order to protect a married woman, who was privy to a breach of trust, from the reasonable consequences of her misconduct, although she was not restrained from anticipation. In the case of a married woman restrained from anticipation, her income accruing subsequently to the breach of trust could not be touched. (*Clive* v. *Carew*, 1 J. & H. 199; *Stanley* v. *Stanley*, 7 Ch. D. 589.)

Sect. 7. Trustee may insure buildings.

7.—(1.) It shall be lawful for, but not obligatory upon, a trustee to insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance

already on foot) not exceeding three equal fourth parts of the full value of such building or property, and to pay the premiums for such insurance out of the income thereof or out of the income of any other property, subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income. Trustee Act, 1888, Sect. 7.

(2.) This section shall not apply to any building or property which a trustee is bound forthwith to convey absolutely to any cestui que trust upon being requested so to do.

In *Fry* v. *Fry*, 27 Beav. 144, it was held that executors were not personally liable for having omitted to perform a covenant to insure on the part of their testator; but it seems to be implied, that if they had performed the covenant, they would have been allowed the amount. But in any case prior to this Act, where there was a tenant for life *sui juris*, an executor or trustee could not safely have applied income in effecting insurance, without the assent of the tenant for life.

Sect. 8. Statute of Limitations may be pleaded by trustees.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

This section will modify the law as enacted by 3 & 4 Will. 4, c. 27, s. 25, and the Judicature Act, 1873, s. 25, sub-s. (2). The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, had already enacted, that sums of money or legacies charged upon land and secured by an express trust should be recoverable only within the same time as if there were not any such trust. It does not follow, notwithstanding the case of *Sutton* v. *Sutton*, 22 Ch. D. 511, that the last-mentioned enactment, though it would release the land, would release the trustee or the testator's general estate.

(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(*b*) If the action or other proceeding is brought

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to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

The time of limitation to an action of debt is fixed at six years by 21 Jac. 1, c. 16, s. 4.

It might be doubted whether the last words of sub-s. (*b*) might not in some cases place a trustee in a worse position than he would have been in before the passing of the Act. Under the equitable doctrine of *laches*, a *cestui que trust* who came in as reversioner, was not always allowed the full analogous legal time of limitation for bringing his claim. (See *Roberts* v. *Tunstall*, 4 Ha. 257.) But it is conceived that this enactment will not be so construed as to abridge any existing immunity of trustees.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

This is intended to guard against the possible danger, that of two beneficiaries, one of age and the other an infant, the latter might have the right to bring his claim when the former had become barred; and that, by simply claiming a replacement of the fund, he might be able to recover the share of the other as well as of himself. It is conceived that this enactment was not necessary, though its insertion may have been due to prudent precaution. One *cestui que trust* could in general prosecute his own claim without prosecuting the claims of the others; and though, where no question of a bar could arise, it was usual to claim the replacement of the fund, yet it is conceived that such a claim, even without the present sub-section, would no longer have been proper after the passing of an Act by which the claim to a part of the fund is barred.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

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9. A power to invest trust money in real securities shall authorise and shall be deemed to have always authorised an investment upon mortgage of property held for an unexpired term of not less than two hundred years and not subject to any reservation of rent greater than one shilling a year, or to any right of redemption, or to any condition for re-entry except for non-payment of rent.

Sect. 9. Investments on mortgage of long terms.

The word "power" will perhaps be made to include a general authority given by statute; but it would more aptly be restricted to express powers inserted in a settlement. It would be a somewhat strange result, if the authority given by this section should, by virtue of 23 & 24 Vict. c. 38, ss. 10, 11, as to which see note on the S. L. Act, 1882, s. 21, sub-s. (i.), at p. 223, *ante*, be extended to all settlements which confer a power to invest upon "Government securities."

As to the enlargement of long terms into a fee simple, see notes on the Conv. Act, 1881, s. 65, p. 142, *ante*. It will be observed that the terms contemplated by this section are not necessarily capable of enlargement.

10. It shall be lawful for any trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if he shall in his discretion think fit, and it shall be the duty of such trustee, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustee from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for

Sect. 10. Trustees of renewable leaseholds may renew.

Trustee Act, 1888, Sect. 10.

his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same, unless the consent in writing of such person is obtained to such renewal on the part of the trustee.

See note on the next following section.

Sect. 11. Power to trustee to raise money to meet fines on renewal of lease.

11. In case any money shall be required for the purpose of paying for the renewal of any lease as aforesaid, it shall be lawful for the trustee effecting such renewal to pay the same out of any money which may then be in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he shall not have in his hands as aforesaid sufficient money for the purpose, it shall be lawful for the trustee to raise the money required by mortgage of the hereditaments to be contained in the renewed lease, or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments comprised in the renewed lease shall be subject; and no mortgagee advancing money upon such mortgage, purporting to be made under this power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purpose aforesaid.

Sects. 10 and 11 are practically a re-enactment of sects. 8 and 9 of Lord Cranworth's Act, 23 & 24 Vict. c. 145, which were repealed by s. 64 of the S. L. Act, 1882. It may be regretted that advantage was not taken of the re-enactment to introduce some obvious improvements. No provision appears to be made for costs of renewal, but only for fines, if any. Costs do not appear properly to come within the expression "money required for the purpose of paying for the renewal." It would also have been desirable to have laid down some principles for apportionment of the money expended, as between the tenant for life and remaindermen; as to which subject see note on the S. L. Act, 1882, s. 21, at p. 222, *ante*. Where the money is raised by mortgage, it would seem that the *corpus* is thrown upon the estate, but that the interest must be kept down by the tenant for life.

In cases where there is no obligation to renew, the tenant for life, by virtue of s. 10, may deprive the trustee of the authority given by the section, although the remainderman might be

willing to provide all the money required. But it is conceived that, apart from the present Act, a trustee would be bound to renew, if the beneficiary desiring the renewal is willing to find the money.

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12.—(1.) This Act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this Act.

Sect. 12. Application of Act.

(2.) Provided always, that save as in this Act expressly provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

THE

MARRIED WOMEN'S PROPERTY ACT, 1882.

(45 & 46 Vict. c. 75.)

An Act to consolidate and amend the Acts relating to the Property of Married Women.

[18th August, 1882.]

Whereas it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled an "An Act to amend the Married Women's Property Act (1870)":

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The following brief historical sketch will be found useful in interpreting the present Act.

The effect of the common law, with regard to the marital right of the husband to and over the wife's personal property, and the rents and profits of her real property, is well summed up in the following passage:—

The marital right, generally.

"By common law, on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by

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obligation, contract or otherwise, if he reduced them into possession; or if he did not, as administrator of his wife if he survived her; and he became also entitled to her chattels real, with full power to alien them, though if he died before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they would survive to the wife." (1 Wh. & Tu. L. C., 5th ed., p. 485; 6th ed., p. 507.)

Real estate.

As above stated, the husband had a right to the rents and profits of the wife's real estate during the coverture. As to any estate of inheritance of which the wife was seised at the time of the marriage, or which devolved upon the wife by descent during the coverture, the husband and wife were jointly seised in right of the wife for the whole of the estate vested in the wife. That the seisin of the husband was for an estate of inheritance, and not only for life, or the joint lives of himself and the wife, is proved by the fact that, whenever homage was an incident of the tenure of the land, it was due from the husband to the superior lord. Before issue born, the homage was of the husband and wife jointly. (Co. Litt. 66 a.) After issue born, the homage was of the husband alone. (Litt. sect. 90.) If the wife died before homage done, no homage was due from the husband as tenant by the curtesy, that being only an estate for life. (*Ibid.*)

So, also, as regards an estate of inheritance in a manor vested in a married woman, the husband and wife were jointly seised in right of the wife; and the homage of the tenants of the manor was due to them both jointly, until issue born of the marriage; but after issue born, to the husband alone. (Co. Litt. 67 a.)

The language of Littleton and Lord Coke shows that by "issue" they meant such issue as would qualify the husband to take an estate by the curtesy upon the death of the wife; that is to say, issue which might by possibility succeed to the estate of inheritance in question. For example, the birth of a daughter would not suffice if the estate was an estate in tail male.

Equitable estates.

The tenure, or relation subsisting between lord and tenant, could not be affected by the tenant creating a trust: by which the lord could not be bound, and of which he was under no obligation to take any notice. The remarks above made as to homage, which is a strict legal incident of tenure, have therefore no bearing upon equitable estates. But so far as equitable estates are to be regarded as property, or as conferring proprietary rights, the marital right of the husband was in general extended to them by courts of equity, in the same manner as it would have been extended to them by courts of law if they had been legal estates.

Separate use.

The devices of the conveyancers (as has often happened in the history of English law) by a long time anticipated the tardy action of the legislature, and effected in practice, by introducing a declaration of trust in favour of the married woman for her separate use, all, or nearly all, that the M. W. P. Act, 1882, has attempted. This gave to the married woman both the

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present enjoyment of the property, and, if the separate use extended beyond her life, the power to dispose of it. (For an example of a married woman entitled in fee simple to her separate use, see *Cooper* v. *Macdonald*, 7 Ch. D. 288.) But the power of disposition was more commonly, and with greater formality, effected by the creation of an express power. The doctrine of separate use was equally applicable to real and to personal property. The opinion was at first entertained that a separate use could not be created without the intervention of an express trustee (see, as to real estate, 1 P. Wms. 126, and as to personal property, 2 P. Wms. 79); but it was soon decided that, where the intention to create separate use was clear, the husband himself should, if necessary, be held to be a constructive trustee for the wife. (*Bennet* v. *Davis*, 2 P. Wms. 316; since which case the rule has not been questioned.)

Curtesy.

To entitle the husband to be tenant by the curtesy of the wife's lands of inheritance after the death of the wife, the following circumstances are necessary:—

(1) That the wife be seised during the coverture of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife (Litt. sects. 35, 52);
(2) That the estate be, or become during the coverture, an interest in possession;
(3) That seisin in deed (less properly styled actual seisin) be obtained during the coverture; and
(4) That issue, capable of succeeding by inheritance as aforesaid, be born alive.

Courts of equity allowed to the husband a right, analogous to curtesy, which may be styled equitable curtesy, in respect of equitable estates having the same nature and *quantum* as legal estates which confer the right (Harg. n. 6, on Co. Litt. 29 a). The phrase equitable estates here includes an equity of redemption (see *Casborne* v. *Scarfe*, 1 Atk. 603); also trust money held upon trust for investment in land. (See *Sweetapple* v. *Bindon*, 2 Vern. 536.) The doubt expressed in the last-cited case, whether curtesy should be allowed if the trust arose under marriage articles, is disposed of by *Cunningham* v. *Moody*, 1 Ves. sen. 174.

If the wife is entitled to her separate use not only as regards the income, but also as regards the *corpus*, this does not prevent the right of the husband from attaching, though it will be defeated by the wife's alienation, whether *inter vivos* or by will. (*Cooper* v. *Macdonald*, 7 Ch. D. 288; overruling *Moore* v. *Webster*, L. R. 3 Eq. 267.) An express declaration contained in the settlement, that the husband "shall not be tenant by the curtesy," will exclude his right altogether; even though the legal estate be in the wife. (*Bennet* v. *Davis*, 2 P. Wms. 316.)

It is conceived that the M. W. P. Act, 1882, does not affect the husband's right to curtesy, further than such right was affected by a separate use before the Act.

Wife's equity to a settlement.

Courts of equity would not actively interfere with the husband in the prosecution of his above-stated legal rights; but in cases

where, by reason of the existence of a trust, or for any similar reason, it was necessary to have recourse to equity, the Court would give him no assistance, except upon condition of his making an adequate settlement in favour of his wife, through whom the right accrued, and her children, if any. This equitable right of the wife is commonly called her equity to a settlement. Her claim under this equity had priority over the claims of the husband's creditors. (*Lady Elibank* v. *Montolieu*, 5 Ves. 737; and see notes thereon, in 1 Wh. & Tu. L. C.) **M. W. P. Act, 1882.**

The wife had an absolute right to waive her equity to a settlement, and her waiver was an absolute bar to all claims on the part of her children.

But if she died, after a decree made, and before the execution of a settlement, without having done anything to waive her equity, the right to a settlement survived to her children. (*Murray* v. *Lord Elibank*, 10 Ves. 84; *S. C.* 13 Ves. 1; and see notes thereon, in 1 Wh. & Tu. L. C.)

A trustee or executor having in his hands personalty belonging to a married woman, was not bound to take any steps to assert her equity to a settlement, but might safely pay or transfer the property to the husband at any time before the filing of a bill to assert her right. (Per Lord Eldon, *Murray* v. *Lord Elibank*, 10 Ves. 84, at p. 90.)

The Married Women's Property Act, 1870, did not effect any very extensive alteration of the previous law. Many of its provisions as to deposits in savings banks, Government stocks, policies of assurance, &c., have been adopted, with modifications, into the present Act; but the extent of its interference with the marital right of the husband is almost summed up in the two following provisions:— The Acts of 1870 and 1874.

(1.) Wages and earnings of a married woman and investments made therewith were to be deemed property settled to her separate use.

(2.) Any woman married after the passing of the Act (9th August, 1870), took for her separate use,—

(a) any personal property to which she became entitled under an intestacy;

(b) any sum of money, not exceeding 200*l.*, to which she became entitled under any deed or will; and

(c) the rents and profits of any real property to which she was entitled by descent.

The Married Women's Property Act (1870) Amendment Act, 1874, 37 & 38 Vict. c. 50, did not deal with the marital right over the wife's property, but with the liability of the husband in respect of the wife's debts, torts, and contracts.

The Married Women's Property Act, 1882, consolidates and very greatly extends the provisions of the Married Women's Property Act, 1870, and the Married Women's Property Act (1870) Amendment Act, 1874; which Acts are repealed as from M. W. P. Act, 1882.

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the 1st January, 1883, the date of its commencement. The following is a brief summary of its chief provisions:—

As regards Women married before the Act:

All property their title to which accrues after the Act, including earnings, is to be their separate property. (Sect. 5.)

All deposits in savings banks, annuities, public funds, and shares in companies and societies, which at the commencement of the Act are standing in a married woman's name, solely (s. 6), are to be taken to be her separate property. This rule is, by s. 8, extended to property standing in her name jointly with any other person except her husband, so far as relates to her interest therein.

As regards Women married after the Act:

All property belonging to a woman at her marriage, or afterwards acquired by or devolving upon her, including earnings, is to be held by her as a *feme sole* (s. 2), subject to the provisions contained in her settlement, if any (s. 19).

As regards all Women married either before or after the Act:

A married woman may acquire, hold, and dispose of any property as if she were a *feme sole*, without the intervention of trustees. (Sect. 1, sub-s. 1.) She may enter into a contract, including the acceptance of a trusteeship or the office of executor (s. 24), and making insurances (see *post*), and may sue and be sued without joinder of her husband (s. 1, sub-s. 2), and may be made bankrupt if trading apart from her husband (s. 5). Her contracts bind property acquired after their date. (Sect. 1, sub-s. 4.) She may lend money to her husband, and prove in his bankruptcy, but not in competition with other creditors for valuable consideration. (Sect. 3.) She has power to make a will (s. 1, sub-s. 1), and if she thereby exercises a general power of appointment, the property thereby appointed becomes liable for her debts (s. 4). She can make investments in her own name, which will be her separate property unless and until the contrary is shown (s. 7); but no company is compelled, contrary to its constitution, to place her on the register in respect of shares to which a liability is attached (*ibid.*). The same remarks apply to her interest in joint investments not made jointly with her husband (s. 8); and she may transfer, or join in a transfer, without her husband (s. 9). She may insure her life or that of her husband, and the policy may be expressed to be for the benefit of her husband or children, or any of them. (Sect. 11.) Such policy, if so expressed, will not form part of her estate, and trustees of the policy moneys may be appointed. (*Ibid.*) A husband may effect an insurance in like manner. (*Ibid.*)

A married woman may take civil proceedings against all persons, and may take criminal proceedings against all persons, except her husband while she is living with him, for the protection of her property. (Sect. 12.) A husband may take criminal, but not civil, proceedings against his wife. (Sect. 16.)

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A married woman remains liable for ante-nuptial debts and contracts (s. 13); and her husband is liable to the extent of any property acquired by him through his wife (s. 14). But in the case of persons married before the Act, such liability is not to be increased or diminished. A husband and wife may be jointly sued. (Sect. 15.) A married woman is liable to the parish for the maintenance of her husband (s. 20) and children. (Sect. 21.)

Investments fraudulently made by a married woman, as against either her husband or creditors, are provided against (s. 10); and premiums fraudulently paid on policies are to be refunded to creditors out of the policy money (s. 11).

Questions of title between husband and wife as to property are to be decided by summons, or otherwise in a summary way, subject to appeal. The County Court has jurisdiction, subject to a right of removal if the amount in litigation exceeds the prescribed limit. (Sect. 17.)

Existing settlements are preserved, and future settlements may be made, including a restraint on anticipation; but any future settlement of a woman's property will be valid against her creditors only so far as a settlement of a man's property would be valid against his creditors. (Sect. 19.)

Sect. 1. Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

A woman married after the Act, and, so far as regards property accruing to her after the Act, a woman married before the Act, can dispose under this section of property by a will executed during coverture. But the will of a married woman made during coverture is still ineffectual to dispose of property acquired after the determination of the coverture, unless it is re-executed. (*Re Price, Stafford* v. *Stafford*, 28 Ch. D. 709.)

If the married woman does not exercise the powers of alienation conferred by the Act, the husband's marital right in respect of her personal estate remains unaffected. (*Re Lambert's Estate, Stanton* v. *Lambert*, 39 Ch. D. 626.) The executor of her will, as to any such property undisposed of, is a trustee of such property for the husband. But, nevertheless, general probate should now be granted of the will of a married woman, and the probate will not be restricted "to such property as the testatrix had a right to dispose of." (*In the Goods of Amelia Price*, 12 P. D. 137.) And the will of a married woman dealing only with realty, but appointing executors, is entitled to probate, if part of the estate is personalty coming within this Act. (*In the Goods of Cubbon*, 11 P. D. 169.)

If a woman dying after the Act attempts by her will to deal with property as to which (having been married before the Act)

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she has no power of disposition, and probate has been granted of her will, the husband's proper course is to take proceedings in the Probate Division to recall the probate and obtain administration. (*Smart* v. *Tranter*, 40 Ch. D. 165.)

The old rule of construction, that under a gift by will to a man and his wife together with other persons, the man and wife take one share only, seems not to have been altered by the Act. (*Re Jupp, Jupp* v. *Buckwell*, 39 Ch. D. 148; but see the contrary opinion expressed by Chitty, J., in *Re March, Mander* v. *Harris*, 24 Ch. D. 222; where his judgment was overruled by the Court of Appeal, 27 Ch. D. 166, upon other grounds.)

This Act does not enable a married woman to make a gift by will for the building of a church, by virtue of 43 Geo. 3, c. 108, s. 1, the disability imposed by the proviso at the end of that enactment continuing still in force. (*Re Smith's Estate, Clements* v. *Ward*, 35 Ch. D. 589.)

Probate of the will of a married woman will, perhaps, now be granted, without express proof that she has died entitled to separate property. The Act seems to have reversed the former presumption that she has no such property unless it is shown that she has, and the presumption now is, that she has such property, unless it is shown that she has not. (See *Harding* v. *Sutton*, 59 L. T. 838.) It has been held in Ireland that general probate should be granted of a will made in exercise of a power only, and not otherwise purporting to dispose of property. (*In the Goods of Ievers*, 13 L. R. Ir. 1.)

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

A woman married before the Act, if a petitioner under the Settled Estates Act, 1877, with regard to property not accruing subsequently to the Act, must of course still be examined separately as provided by sect. 50 of the Act of 1877. (*Re Harris' Settled Estates*, 28 Ch. D. 171.) It is otherwise if the woman was married after the Act. (*Riddell* v. *Errington*, 26 Ch. D. 220.)

It is still the rule that a married woman cannot act as next friend or guardian *ad litem*. (*Re Duke of Somerset, Thynne* v. *St. Maur*, 34 Ch. D. 465.)

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A married woman may sue for a tort which was committed before the Act without joining her husband. (*Weldon* v. *Winslow*, 13 Q. B. D. 784, which overruled *Weldon* v. *Rivière*, W. N. 1884, p. 154; 53 L. J. Q. B. 448; see also *James* v. *Barraud*, 31 W. R. 786.) She can also sue alone for a trespass committed in a house purchased by her out of her separate earnings since the Married Women's Property Act of 1870. (*Weldon* v. *De Bathe*, 14 Q. B. D. 339.) And she may sue without a next friend and without giving security for costs (*Threlfall* v. *Wilson*, 8 P. D. 18; *Re Isaac, Jacob* v. *Isaac*, 30 Ch. D. 418); even though the cause of action arose before the Act. (*Severance* v. *Civil Service Supply Association*, 48 L. T. 485.) But if she sues by a next friend, security for costs may be required. (*Re Thompson, Stevens* v. *Thompson*, 38 Ch. D. 317.) It is conceived that a husband could not commit a trespass by entering his wife's house, unless judicially separated from her. But under special circumstances, a wife may be entitled to an injunction to restrain him from entering. (*Symonds* v. *Hallett*, 24 Ch. D. 346.)

In *Scott* v. *Morley*, 20 Q. B. D. 120, the Court of Appeal said that a judgment under this sub-section against a married woman should be as follows:—

> "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless, by reason of sect. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

Where the action is against the husband and wife jointly, see *Downe* v. *Fletcher*, 21 Q. B. D. 11.

Unless at the time of the judgment she has separate property capable of being bound by it, she is not liable to be committed to prison under the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 5, for non-payment of the debt, though it be shown that, since the judgment, she has been in receipt of income as to which she is restrained from anticipation. (*Draycott* v. *Harrison*, 17 Q. B. D. 147.)

All married women became discovert within the meaning of 21 Jac. 1, c. 16, s. 7, immediately on the passing of the present Act; and their right of action then accrued for torts committed before the Act. (*Lowe* v. *Fox*, 15 Q. B. D. 667. The decision on *S. C.* in 12 App. Cas. 206 was on another point. See also *Weldon* v. *Neal*, W. N. 1884, p. 153; 32 W. R. 828.) It seems to follow that now, as against married women, the statute begins to run as against *femes sole*.

The Act does not deprive a husband of any remedy which he previously had against his wife's separate estate; and therefore he may still bring an action to charge her separate estate for money lent by him to her after their marriage. (*Butler* v. *Butler*, 16 Q. B. D. 374.)

The Act has not abolished the husband's liability for his wife's

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torts committed subsequently to the marriage; and the person aggrieved may at his option either sue the husband and wife jointly or the wife alone. (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177.)

Costs may be ordered to be paid by a married woman out of separate property which she has acquired since the cause of action arose; but the Court of Appeal will not interfere with the discretion of the Court below as to whether such after-acquired property shall be rendered liable. (*Neville* v. *Baker*, 4 Times Rep. 674.)

Judgment may now be given, under R. S. C. 1883, Ord. XVI. r. 52, against a married woman, when brought in as a third party, charging her separate estate, even in respect of a liability incurred before the Act. (*Gloucestershire Banking Co.* v. *Phillipps*, 12 Q. B. D. 533.)

In a case where the cause of action accrued prior to the Act, judgment was entered against a married woman as sole defendant, though the writ did not claim to charge her separate estate. (*Brown* v. *Morgan*, 12 L. R. Ir. 122.)

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

Previously to the enactment of this sub-section, a married woman's contract, made so as to bind her separate estate, bound only so much of her separate estate as she was entitled to, without restraint on anticipation, at the date of the contract, and retained at the date of the judgment, and did not bind either property acquired after the contract, or property as to which she was restrained from anticipation at the date of the contract. (*Pike* v. *Fitzgibbon*, 17 Ch. D. 454.)

This and the foregoing sub-section do not include contracts entered into by a married woman before the Act. (*Conolan* v. *Leyland*, 27 Ch. D. 632.) And such a contract does not bind property acquired after the Act. (*Turnbull* v. *Forman*, 15 Q. B. D. 234.) In *Bursill* v. *Tanner*, 13 Q. B. D. 691, the view seems to have been entertained that these sub-sections are retrospective. This view was questioned by the Court of Appeal in *Turnbull* v. *Forman*, *supra*, and appears to be very doubtful.

The exercise by will of a general power of appointment by a married woman dying since the Act does not make the appointed property liable for her contracts entered into before the Act. (*Re Roper*, *Roper* v. *Doncaster*, 39 Ch. D. 482.)

The doubt which seems to have been expressed by the learned

M. W. P. Act, 1882, Sect. 1.

judge in that case, that the appointment does not make the property liable for her contracts entered into subsequently to the Act, upon the ground that it does not make the property her "separate property," seems difficult to reconcile with s. 4, p. 334, *post*.

It appears to have been decided, notwithstanding sub-s. (4), that a married woman cannot be made liable upon a contract at all, unless she has some separate property at the date of the contract; and that the onus of proving this fact lies upon the plaintiff. (*Re Shakespear, Deakin* v. *Lakin*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519.)

Neither this section, nor s. 19, p. 346, *post*, renders property comprised in a settlement made before the Act liable to a married woman's debts, if it would not have been so liable independently of the Act. (*Beckett* v. *Tasker*, 19 Q. B. D. 7. See also *Myles* v. *Burton*, 14 L. R. Ir. 258.)

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Before this enactment a married woman could not be made a bankrupt under any circumstances, unless she were trading under the custom of London. She cannot now be made a bankrupt, unless she is carrying on a trade separately from her husband. (*Re Gardiner, Ex parte Coulson*, 20 Q. B. D. 249.)

Notwithstanding the language of s. 19, p. 346, *post*, the life estate (without restraint on anticipation) of a married woman under a settlement will vest in her trustee in bankruptcy. (*Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264.)

Property which a married woman might have appointed in exercise of a general power of appointment, but which she has not in fact so appointed, is not her separate property within this enactment; and her trustee in bankruptcy cannot compel her to exercise the power. (*Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521.)

Sect. 2. Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from

M. W. P. Act, 1882, Sect. 2.

her husband, or by the exercise of any literary, artistic, or scientific skill.

Compare the Act of 1870, sects. 1, 7, and 8.

The words, "in manner aforesaid," appear to refer to s. 1, sub-s. (1), *ante*, and to mean, "by will or otherwise."

The words, "separately from her husband," appear to qualify the word "engaged," as well as the words "carries on." The question as to the exclusion of the husband's agency is, of course, a question of fact; as to which, see *Petty* v. *Anderson*, 3 Bing. 170; *Smallpiece* v. *Dawes*, 7 C. & P. 40.

Sect. 3. Loans by wife to husband.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

It has been held that this section does not apply to money lent by the wife to the husband for purposes unconnected with his trade; and she may prove therefor in competition with creditors. (*Re Tidswell, Ex parte Tidswell*, 35 W. R. 669.) The onus of proof, as against the husband's creditors, lies upon the wife. (*Re Genese, Ex parte District Bank of London*, 16 Q. B. D. 700.) But as against the husband, so far as the corpus of the wife's estate is concerned, the onus lies upon the husband. (*Alexander* v. *Barnhill*, 21 L. R. Ir. 511.) As regards the income, where the husband and wife are living together, the onus of showing that the income was not received by the husband as a gift lies upon the wife, except, perhaps, as to the income of the immediately preceding year. (*Ibid.*) The section does not apply to money lent for trade purposes to a partnership in which the husband is a partner. (*Re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88.)

A strong opinion was expressed in *Alexander* v. *Barnhill*, *supra*, by the V.-C. of Ireland, that the effect of the words, "or otherwise," is to enlarge the preceding words, and that the section is not restricted to money lent to the husband for some purpose similar to purposes of trade or business. This is inconsistent with the decision in *Re Tidswell, Ex parte Tidswell*, *supra*.

The section is not retrospective, and does not make a settlement executed in favour of a wife before the Act invalid as against creditors of the husband, if otherwise valid. (*Re Home, Ex parte Home*, 54 L. T. 301.)

Sect. 4. Execution of general power.

4. The execution of a general power by will by a married woman shall have the effect of making the

property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

M. W. P. Act, 1882, Sect. 4.

It has been held that such an appointment will not render the property liable for contracts entered into before the Act. (*Re Roper, Roper* v. *Doncaster*, 39 Ch. D. 482.) The doubt expressed in that case, whether the appointment renders the property liable for contracts entered into subsequently, seems to be without foundation.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

Sect. 5. Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

Compare the Act of 1870, sects. 1, 7, and 8.

Property which had accrued in title before the Act is not brought within the section by accruing in possession subsequently to the Act. (*Re Adames' Trusts*, 33 W. R. 834; *Re Tucker, Emanuel* v. *Parfitt*, 33 W. R. 932; *Re Hobson, Webster* v. *Rickards*, W. N. 1885, p. 218; 34 W. R. 195; *Re Tench's Trusts*, 15 L. R. Ir. 406; *Reid* v. *Reid*, 31 Ch. D. 402, which case overruled *Baynton* v. *Collins*, 27 Ch. D. 604, *Re Thompson and Curzon*, 29 Ch. D. 177, and *Re Hughes' Trusts*, W. N. 1885, p. 62.) See also *Re Dixon, Dixon* v. *Smith*, 35 Ch. D. 4, at p. 5. An interest taken by one person in default of another person is a vested interest, though liable to be divested by an appointment; and such an interest, if so vested before the Act, is not brought within this section by falling into possession after the Act. (*Re Beaupré's Trusts*, 21 L. R. Ir. 397.)

A woman, who was an executrix and residuary legatee, married in 1880. She had discharged all the duties of the executorship. In 1883 she brought an action for a debt which had fallen due to her testator's estate in 1879. It was held that her beneficial title to the residue accrued before the Act. (*Edwards* v. *Edwards*, 1 Cab. & Ell. 229.) The question seems hardly to admit of argument.

As to the effect of settlements upon this section, see s. 19, and note thereon, p. 346, *post*.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the

Sect. 6. As to stock, &c. to which a married woman is entitled.

M. W. P. Act, 1882, Sect. 6.

National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient primâ facie evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

Compare the Act of 1870, ss. 2, 3, 4, and 5.

As to property of these descriptions held by a married woman as executrix or trustee, see s. 18, p. 346, *post*. The Act of 1870 did not provide for such cases. (See *Howard* v. *Bank of England*, L. R. 19 Eq. 295; and note on s. 8, at p. 338, *post*.)

Sect. 7. As to stock, &c. to be transferred, &c. to a married woman.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other

M. W. P. Act, 1882, Sect. 7.

bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this Act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Compare the Act of 1870, ss. 2, 3, 4, and 5.

Under the Act of 1870, a married woman could not be the legal owner of shares, &c., to which any liability was attached.

Sect 8. Investments in joint names of married woman and others.

8. All the provisions herein-before contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to

M. W. P. Act, 1882, Sect. 8.

or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

See the next following section.

Under the Act of 1870, a married woman, registered as owner of stock jointly with other persons, could not transfer without the concurrence of her husband. (*Howard* v. *Bank of England*, L. R. 19 Eq. 295.) The reason was that the bank could not be compelled to enquire whether she was interested beneficially or not.

Sect. 9. As to stock, &c. standing in the joint names of a married woman and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

See note on the last preceding section.

Sect. 10. Fraudulent investments with money of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman

M. W. P. Act, 1882, Sect. 10.

by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Compare the provisos in the Act of 1870, sects. 2, 3, 4, and 5, and *ibid.* s. 6.

Sect. 11.

Moneys payable under policy of assurance not to form part of estate of the insured.

11. A married woman may by virtue of the power of making contracts herein-before contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the

M. W. P. Act, 1882, Sect. 11.

policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

Compare the Act of 1870, s. 10.

A petition presented since the commencement of the present Act by a widow, for the appointment of trustees of the proceeds of a policy effected by her husband on his own life under the corresponding provisions of the Act of 1870, for the benefit of his wife and children, should be entitled in the Matter of the present Act. (*Re Soutar's Policy Trust*, 26 Ch. D. 236.)

In *Re Mellor's Policy Trusts*, 6 Ch. D. 127, it was held by Malins, V.-C., that the proceeds of a policy effected as above mentioned under the Act of 1870, which contained no declaration of trust, but was only stated to be for the benefit of the wife and children, ought to be settled upon the usual trusts of a settlement; that is, upon the widow for life, with remainder to the children on attaining twenty-one or (if daughters) on marriage under that age; but subsequently, *S. C.*, 7 Ch. D. 200, he permitted the fund to be distributed as in case of an intestacy, upon the ground that the family were in very poor circumstances. In *Re Adam's Policy Trusts*, 23 Ch. D. 525, where the wife had died in the lifetime of the husband, Chitty, J., without actually deciding whether the wife, if living, would have taken for life, or as a joint tenant with the children, held that the children took as joint tenants; but he intimated a leaning towards the former opinion. This case also shows that if the Court is applied to for the appointment of trustees of such a fund, it will also declare the trusts upon which the fund is to be held. It has since been

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held by North, J., that the proceeds of a policy taken out as above mentioned under the Act of 1870 go to the widow and children as joint tenants. (*Re Seyton, Seyton* v. *Satterthwaite*, 34 Ch. D. 511.) Whatever was the rule under the Act of 1870 will apply to policies taken out under the present Act; but the rule cannot be regarded as clearly settled. The present Act for the first time provides that the person insured may, by the policy, or by a separate memorandum, appoint trustees of the policy moneys. In the policy itself, it is clear, from the language of the section, that special trusts might be declared; and probably the same thing might be done by a separate memorandum appointing trustees.

At the request of the wife and children, a policy may be exchanged for another policy of smaller amount, but fully paid up. (*Schultze* v. *Schultze*, 56 L. J. Ch. 356.)

Sect. 12. Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso herein-after contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Compare the Act of 1870, s. 11.

This section does not enable a wife to commence criminal proceedings for defamatory libel against her husband. (*Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772.)

M. W. P. Act, 1882, Sect. 12.

When an injunction is granted upon the application of a married woman, her sole undertaking as to consequent damages is sufficient. (*Re Prynne*, W. N. 1885, p. 144; 53 L. T. 455.) Where such an undertaking has been given, a husband (defendant) is not debarred from enforcing it against his wife (plaintiff) by the language of this section relating to torts. (*Hunt* v. *Hunt*, W. N. 1884, p. 243; 54 L. J. Ch. 289.)

As a husband is not liable to criminal proceedings for taking his wife's money while they are living together, a mere allegation that he has robbed his wife will not, if they are in fact living together, support an action of slander. (*Lemon* v. *Simmons*, 57 L. J. Q. B. 260.) A communication by a husband to his wife cannot amount to the publication of a libel. (*Wennhak* v. *Morgan*, 20 Ch. D. 635.)

Sect. 13. Wife's antenuptial debts and liabilities.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Compare the Act of 1870, s. 12, so far as it is not repealed by the Act of 1874, s. 1.

M. W. P. Act. 1882, Sect. 13.

In an action against husband and wife jointly to recover a debt of the wife contracted before marriage, which had taken place after the Acts of 1870 and 1874, but before the present Act, it was held that judgment might be entered against the wife under R. S. C. 1883, Ord. XIV. r. 1, making the debt and costs payable out of her separate property, with a restriction as regards execution similar to that settled by the Court in *Scott* v. *Morley*, 20 Q. B. D. 120, at p. 132; as to which, see note on s. 1, sub-s. (2), at p. 331, *ante*. (*Downe* v. *Fletcher*, 21 Q. B. D. 11.)

Sect. 14. Husband to be liable for his wife's debts contracted before marriage to a certain extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bonâ fide recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which he may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Compare the Act of 1874, sects. 2 and 5.

This section seems not to apply to the husbands of women married between the commencement of the Act of 1870 and the commencement of the Act of 1874, that is, from 9th August, 1870, to 30th July, 1874.

See, as to a husband's liability after his wife's death, *Bell* v. *Stocker*, 10 Q. B. D. 129, cited in the note to the next following section.

A husband, executor of his wife's will made under a testamentary power, may retain out of her estate her funeral expenses, although the estate is insolvent. (*Re M'Myn, Lightbown* v. *M'Myn*, 33 Ch. D. 575.)

M. W. P. Act, 1882, Sect. 15.

Suits for ante-nuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Compare the Act of 1874, sects. 1, 3, and 4.

Under the Acts of 1870 and 1874, a husband was not liable, after his wife's death, for her debts contracted before marriage, whether he had acquired property through her or not. (*Bell* v. *Stocker*, 10 Q. B. D. 129.)

Sect. 16. Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

This section does not enable a husband to give evidence against his wife. (*Reg.* v. *Brittleton*, 12 Q. B. D. 266.)

Sect. 17. Questions between husband and wife

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company,

M. W. P. Act, 1882, Sect. 17.

as to property to be decided in a summary way.

public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the

M. W. P. Act, 1882, Sect. 17.

county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

Compare the Act of 1870, sect. 9.

Under this section a wife who has been judicially separated from her husband is entitled to an inquiry whether chattels retained by him are her separate property. (*Phillips* v. *Phillips*, 13 P. D. 220.)

Sect. 18. Married woman as an executrix or trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid, of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

It was held by Bacon, V.-C., that a married woman who was a devisee and trustee for sale of real estate, was, under the circumstances, a "bare trustee" within the meaning of the Vendor and Purchaser Act, 1874, s. 6, p. 395, *post*, although she was entitled to a share of the proceeds of sale; and that therefore she might convey without her husband's concurrence, and without separate acknowledgment. (*Re Docwra, Docwra* v. *Faith*, 29 Ch. D. 693.) But in that case a sale had actually been made under an order of the Court; and the decision seems to have rested upon that ground. A trustee for sale is not, under ordinary circumstances, a bare trustee.

It will be observed that this section, at all events so far as regards conveyances, refers only to annuities, deposits, stocks, and similar property. Sects. 2 and 5, *ante*, which refer to all kinds of property, evidently contemplate property of which the married woman is not a trustee. The question, whether a married woman trustee, holding property under the provisions of this Act, can convey real estate as a *feme sole*, has not been decided.

Sect. 19. Saving of existing

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a

M. W. P. Act, 1882, Sect. 19.

settlements, and the power to make future settlements.

settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

This section does not render property comprised in a settlement, made before the Act, liable to the married woman's debts, if it would not have been so liable independently of the Act. (*Beckett* v. *Tasker*, 19 Q. B. D. 7. See also *Myles* v. *Burton*, 14 L. R. Ir. 258.)

Notwithstanding the somewhat incautious language of this section, the life estate (without restraint on anticipation) of a married woman under a settlement will vest in her trustee in bankruptcy. (*Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264.)

Under the Act of 1870, a restraint against anticipation would not have defeated the claims of her ante-nuptial creditors. (See *Axford* v. *Reid*, 37 W. R. 291.)

Notwithstanding the great lengths to which the Courts have gone, with a view to uphold ante-nuptial settlements, such a settlement can be set aside under 13 Eliz. c. 5, if it was made by collusion between the parties for the purpose of defeating the husband's creditors. (*Re Pennington, Ex parte Pennington*, W. N. 1888, p. 205; 5 Times Rep. 29, and cases there cited.)

The order giving leave to enter final judgment should state that execution is restricted to such separate estate as the married woman is not restrained from anticipating, unless such restraint is imposed by a settlement made by herself. (*Bursill* v. *Tanner*, 13 Q. B. D. 691; *Nicholls* v. *Morgan*, 16 L. R. Ir. 409.) And it would seem that such settlement must have been made since the commencement of the Act. (See *Turnbull* v. *Foreman*, 15 Q. B. D. 234. See also *Smith* v. *Whitlock*, 34 W. R. 414.) In such a case the debt may be ordered to be paid by instalments, subject to a similar restriction. (See *Johnstone* v. *Browne*, 18 L. R. Ir. 428, in which case the debtor, having failed to pay the instalments, an order was subsequently made for her committal to prison: 20 L. R. Ir. 443.)

Judgment may be signed against a married woman under

M. W. P. Act, 1882, Sect. 19.

R. S. C. 1883, Ord. XIV.; but not unless the plaintiff consents to limit its operation to her separate property. (*Moore* v. *Mulligan*, Bittlest. 127. But see *Gunston* v. *Maynard*, 75 L. T. Newsp. p. 102.) And a receiver may be appointed of her separate property which she is not restrained from anticipating. (*Perks* v. *Mylrea*, W. N. 1884, p. 64; Bittlest. 128.)

A covenant entered into by a woman in anticipation of her marriage before the Act, to settle after-acquired property except interest limited to her separate use, will include property bequeathed to her after the Act absolutely. (*Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, *Christian* v. *Whitaker*, 34 Ch. D. 227.) It has been held that this doctrine does not apply to a post-nuptial settlement made before the Act, because the wife being under disability was unable to contract: *Re Queade's Trusts*, W. N. 1885, p. 99; 33 W. R. 816; but this case was disapproved by the Court of Appeal in *Hancock* v. *Hancock*, 38 Ch. D. 78, where it was held that an ante-nuptial settlement, made before the Act, which contained a similar covenant on the part of the husband alone, would include property coming to the wife subsequently to the Act.

A widow, having a general power of appointment by will over property comprised in a settlement made on her former marriage, was held entitled, after her subsequent marriage, to have the property transferred to her, without executing any formal release of the power. (*Re Onslow*, *Plowden* v. *Gayford*, 39 Ch. D. 623.) In that case the order was, that the fund should be transferred to the husband and wife jointly; but this could only have been done at the wife's request, because the husband had evidently no interest in the fund.

Sect. 20. Married woman to be liable to the parish for the maintenance of her husband.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from

31 & 32 Vict. c. 122.

such woman as if she were a feme sole by the same actions and proceedings as money lent. M. W. P. Act, 1882, Sect. 20.

Compare the Act of 1870, s. 13.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren. Sect. 21. Married woman to be liable to the parish for the maintenance of her children.

Compare the Act of 1870, s. 14.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act. Sect. 22. Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living. Sect. 23. Legal representative of married woman.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before Sect. 24. Interpretation of terms.

M. W. P. Act, 1882, Sect. 24.

or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Sect. 25. Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Sect. 26. Extent of Act.

26. This Act shall not extend to Scotland.

Sect. 27. Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

THE

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

(51 & 52 Vict. c. 51.)

An Act for registering certain Charges on Land, and for facilitating Searches for them.

[24th December, 1888.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Part I.—Introductory.

Sect. 1. Short title.

1. This Act may be cited as the Land Charges Registration and Searches Act, 1888.

Sect. 2. Commencement.

2. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that any rules under this Act may be made, and any other thing for the purpose of bringing this Act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this Act.

Sect. 3. Extent.

3. This Act shall not extend to Scotland or Ireland.

Land Charges &c. Act, 1888, Sect. 4.

Interpretation.

4. In this Act:

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

This definition does not properly include terms of years: see note on the Conveyancing Act, 1881, s. 2, sub-s. (ii.), p. 2, *ante*. But in s. 5, sub-s. (2), *post*, the word "land" may probably be interpreted to include them. It is still more difficult to stretch the language used so as to include equitable estates or equities of redemption.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this Act.

"Act of Parliament" includes local and personal Act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any Act of Parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such Act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an Act of Parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot.

24 & 25 Vict. c. 133.

46 & 47 Vict. c. 61.

The Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 34, 35, and 36, is printed p. 411, *post;* and the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 29, together with the First Schedule, is printed p. 412, *post*.

Messrs. Elphinstone & Clark, in their Commentary on this

Land Charges &c. Act, 1888, Sect. 4.

Act, which is a separately published appendix to their valuable work, "On Searches," p. 8, make the following remark:— "There are some cases where, as in the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), and in the Hastings Improvement Act (48 & 49 Vict. c. cxcvi.), the money for which a rate is levied is also made a charge on the property in respect of which the rate was made. Probably in such cases the charge ought to be registered as a land charge; but whether it be or be not so registered, the remedies for the recovery of the rate will not be affected."

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

50 & 51 Vict. c. 57.

The Deeds of Arrangement Act, 1887, 50 & 51 Vict. c. 57, s. 4, is as follows:—

"4.—(1.) This Act shall apply to every Deed of Arrangement, as defined in this section, made after the commencement" [1st January, 1888] "of this Act.

"(2.) A Deed of Arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

"(*a*) An assignment of property;

"(*b*) A deed of or agreement for a composition;

"And in cases where creditors of a debtor obtain any control over his property or business:—

"(*c*) A deed of inspectorship entered into for the purpose of carrying on or winding-up a business;

"(*d*) A letter of licence authorising the debtor or any other person to manage, carry on, realise, or dispose of a business, with a view to the payment of debts; and

"(*e*) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business, with a view to the payment of his debts."

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

Land Charges &c. Act, 1888.

PART II.—REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

Sect. 5. Register of writs and orders affecting land.

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land.

The registration is optional, except that the omission to register entails the inconveniences mentioned in s. 6, *post*. It is, perhaps, to be regretted that Parliament did not extend the principle of registration to executions as well as to writs. The common form advice, "it should be ascertained that the land has not been delivered in execution," is easily written, but is in many cases very difficult to follow in practice.

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

In some cases difficulty will be experienced in ascertaining what name is to be placed upon the register. This is quite clear only in one case, namely, where there exists a tenant in fee simple, for his own benefit, free from incumbrances. Cases might easily be mentioned in which the difficulty would be considerable. An owner in fee simple might contract debts and devise his land in settlement; then die, leaving the land to devolve upon an equitable tenant for life. If the creditors were to sue the settlor's executor, who refused to admit assets, it would be necessary to administer the testator's real and personal estate; thereupon, judgment for administration having been given, an order might be obtained appointing a receiver, and such order would be an order within this sub-section. It does not clearly appear in whose name or names this order should be registered.

It is suggested that in such a case the order ought to be registered in the name of the testator, although it might be questioned whether a deceased testator is a "person."

The connection, or absence of connection, of the Act with the subject of bankruptcy is somewhat obscure. Although, by s. 4, *supra*, "'judgment' does not include an order made by a Court having jurisdiction in bankruptcy in the exercise of that jurisdiction," that would be no reason why any "writs or orders" which are not judgments should not come within the present section, although made by a Court of Bankruptcy. But such

Land Charges &c. Act, 1888, Sect. 5.

writs and orders must either be "for the purpose of enforcing a judgment," which does not include a bankruptcy judgment, or for the purpose of enforcing a "statute or recognizance," which is not likely to occur, or must be an "order appointing a receiver or sequestrator of land." The appointment of a trustee in bankruptcy renders superfluous the appointment of a receiver. A writ of *sequestrari facias de bonis ecclesiasticis* seems not to be an order. Moreover, by the Bankruptcy Act, 1883, s. 52, the certificate of the appointment of the trustee in bankruptcy is made sufficient authority for the granting of sequestration without any writ or other proceeding.

The other kind of sequestration referred to in the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 8), and *Sykes* v. *Dyson*, L. R. 9 Eq. 228, seems to be confined to Courts of Equity. Upon the whole, it would appear that, by a very obscure route, we come to the conclusion that the Act lies wholly outside bankruptcy jurisdiction and practice.

(3.) The registration of a writ or order in pursuance of this Act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other Act.

As to registration in the Central Office, see note on the Conv. Act, 1882, s. 2, sub-s. (1), at p. 163, *ante*.

Sect. 6. Protection of purchasers against non-registered writs and orders.

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this Act.

Provided that—

(*a*.) Where the writ or order is at the commencement of this Act registered in pursuance of the Act of the session held in the twenty-seventh and twenty-eighth years of Her Majesty, chapter one hundred and twelve, intituled "An Act to amend the law relat-

Land Charges &c. Act, 1888, Sect. 6.

ing to future judgments, statutes, and recognizances," nothing in this section shall affect the operation of such writ or order until the expiry of the period for which it is so registered;

(*b.*) Where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

The Act will apply to writs and orders issued and made before its commencement; but if duly registered under 27 & 28 Vict. c. 112, at the Act's commencement, such writs and orders are protected from the operation of this section until the expiration of the period of five years during which the existing registration remains in force by virtue of 2 & 3 Vict. c. 11, s. 4, and 18 & 19 Vict. c. 15, s. 6. Also all writs and orders are excepted from the operation of the section, which are issued or made in any proceeding registered as a *lis pendens*. As to the registration of *lis pendens*, see 2 & 3 Vict. c. 11, s. 7.

By 27 & 28 Vict. c. 112, s. 1, no judgment (although registered under the old system) which is entered up after 29th July, 1864, affects any land until the land has been actually delivered in execution in pursuance of the judgment. It is conceived that this rule will apply to writs and orders, registered under the present Act, issued or made for the purpose of enforcing a judgment. The Act contains nothing to give to any writ or order any greater force or power than it had before the Act.

By s. 3 of the last-mentioned Act, every writ or other process of execution, by virtue of which any land has been actually delivered in execution, is to be registered under 23 & 24 Vict. c. 38, and no other or prior registration is to be deemed necessary for any purpose. It was held in *Re Pope*, 17 Q. B. D. 743, that when the land has been delivered in execution this cures a prior defect of registration, and that the execution cannot be impeached by reason of such defect. In that case the execution was not under an *elegit*, but was an equitable execution effected by the appointment of a receiver, which was held to be a "process of execution" within the meaning of the above-cited enactment.

The present section, which makes even the delivery in execution under an unregistered writ void against the purchaser, abrogates the ruling of *Re Pope*, *supra*; but subsequent registration would apparently cure the defect.

Land Charges &c. Act, 1888.

Part III.—Registration of Deeds of Arrangement.

Sect. 7. Register of deeds of arrangement affecting land.

7. A register (in this Act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor.

As to the definition of "deed of arrangement," see s. 4, at p. 353, *ante*.

Sect. 8. Registration of deeds of arrangement.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Sect. 9. Protection of purchasers against unregistered deeds of arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this Act, shall be void as against a person who, after the commencement of this Act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this Act until the expiration of one year from the commencement of this Act if registered within that year.

Part IV.—Registration of Land Charges.

Sect. 10. Registry of land charges.

10. A register, in this Act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

For definition of "land charge," see s. 4, at p. 352, *ante*.

(1.) In the case of freehold land, in the name of

Land Charges &c. Act, 1888, Sect. 10.

the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

It is probable that this language will be held to include an equitable tenant for life or in tail.

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Some outline of the present state of things which is intended to be remedied by this part of the Act may be gathered from Elphinstone & Clark on Searches, pp. 109—124. At present it is a common practice to omit searches for land charges altogether. Even when the alterations effected by this part of the Act have come into general operation, it would still be necessary, in order to be perfectly secure, to search in the name of every owner of the land for the longest of the periods allowed by the various Acts authorizing the creation of land charges. This period might easily extend considerably beyond the commencement of the title stipulated to be shown. Such a search, even when possible, would in many cases be as much out of the question practically as a complete search under the old practice. As such charges are a continuing burden, frequently recurring at short intervals, they cannot fail to be known to the owner for the time being, and it is conceived that to suppress them on a sale or mortgage would be a misdemeanour under 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8. This has hitherto proved to be a sufficient protection to purchasers, and it is conceived that the improvements contemplated by this part of the Act are of a speculative rather than a practical character. The Act is more likely in practice to depreciate the property of owners of land charges than to afford any protection to purchasers; especially having regard to s. 12, *infra*, and the difficulty referred to in the note thereon.

Sect. 11. Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this Act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any

part of such land charge next after such expenses are incurred.

Land Charges &c. Act, 1888, Sect. 11.

12. A land charge created after the commencement of this Act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this Act.

Sect. 12. Protection of purchasers against unregistered charges.

The language at the end of this section is copied from 1 & 2 Vict. c. 110, s. 19, and is, to say the least, susceptible of the interpretation that by a registration subsequent to the purchase, the charge will be revived as against the purchaser. In no other way can the words "and until" have any meaning assigned to them. As Lord Selborne, then at the bar, argued in *Hargrave* v. *Hargrave*, 23 Beav. 484, at p. 485:—"This merely suspends its operation 'until' that act is done, but when registered, it has relation to the date." It is conceived that these words were inserted into the earlier Act *per incuriam*, and it may be regretted that the opportunity was not taken of substituting something more appropriate. The Courts will probably adopt the device suggested by Lord Romilly in *Hargrave* v. *Hargrave*, *supra*, for evading their effect; otherwise this part of the Act will prove a mere trap for purchasers, instead of a protection to them.

This ill-advised language has not been repeated in s. 13.

The section omits to provide for the case of a purchaser who has purchased with express notice of an unregistered land charge. It is conceived that the principle of *Le Neve* v. *Le Neve*, 3 Atk. 646, Ambl. 436, will be held to apply. (See also notes thereon, 2 Wh. & Tu. L. C.)

13. After the expiration of one year from the first assignment by act inter vivos, occurring after the commencement of this Act, of a land charge created before the commencement of this Act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land, unless such land charge is registered in the registry of land charges in the manner mentioned in this Act prior to the completion of the purchase.

Sect. 13. Non-registered land charge existing at commencement of this Act.

See note on s. 12, *supra*.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof.

Sect. 14. Vacation of entry.

Land Charges &c. Act, 1888.

Part V.—Supplemental.

Sect. 15. Index to registers.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this Act.

Sect. 16. Searches.

16. Any person may search in any register or index kept in pursuance of this Act on paying the presented [*sic*] fee.

The word "presented" seems to be a mistake for "prescribed."

Sect. 17. Official searches.

45 & 46 Vict. c. 39.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to [*sic*] the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this Act in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this Act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

See notes on the Conv. Act, 1882, s. 2, p. 162, *ante*.

Sect. 18. General rules.

18. The Lord Chancellor may at any time after the passing of this Act, and from time to time, with the concurrence of the Commissioners of Her Majesty's Treasury as to fees, make such general rules as may be required for carrying this Act into effect.

APPENDICES.

APPENDIX I.

RULES RELATING TO THE FOREGOING ACTS.

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APPENDIX I.

RULES

Under the Act for the Abolition of Fines and Recoveries, and Section 7 of the Conveyancing Act, 1882.

1. No person authorized or appointed under the Act 3 & 4 Will. 4, c. 74 (in these rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women, shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband, and from the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

"This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts

and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorized to take the acknowledgment:—

(Signed) *A.B.*

A judge of the High Court of Justice in England,
or, A judge of the county court of
or, A perpetual commissioner for taking acknowledgments of deeds by married women
or, The special commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorized to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the central office.

8. The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors Remuneration

Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 & 4 *Will.* 4, *c.* 74 (*the Fines and Recoveries Act*).

	£	*s.*	*d.*
For the indorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors, of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5*s.*, together .	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands .	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words	0	0	6

[*Rule* 9 *repeals former Orders.*]

10. These rules shall take effect from and after the 31st December, 1882.

RULES

Under Section 2 of the Conveyancing Act, 1882.

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

RULE

Under the Conveyancing and Law of Property Act, 1881.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the office.

APPENDIX

To Rules relating to the Conveyancing Acts, 1881, 1882.

Form I.

Declaration by Separate Instrument as to Purposes of Search.

Supreme Court of Judicature,
Central Office.
To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London.
In the matter of A. B. and C. D.

I declare that the search [*or* searches] in the name [*or* names] of required to be made by the requisition for search, dated the is [*or* are] required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

Signature,
Address, and
Description.

Dated

Form II.

Declaration as to Purposes of Search contained in the Requisition.

I declare that the above-mentioned search is required for the purposes of a sale [*or* mortgage, *or* lease, *or as the case may be*], by A. B. to C. D.

Form III.

Requisition for Search in the Enrolment Office under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.
Requisition for Search.
To the Clerk of Enrolments,
Royal Courts of Justice,
London.
In the matter of A. B. and C. D.
Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds

and other documents enrolled during the period from 18 , to 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM IV.

Requisition for Search in the Bills of Sale Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Bills of Sale,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM V.

Requisition for Search in the Registry of Certificates of Acknowledgments of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women.
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 , to 18 , both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM VI.

Requisition for Search in the Registry of Judgments under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Requisition for Search.

To the Registrar of Judgments,
Royal Courts of Justice,
London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for

judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 , to 18 , both inclusive, and for executions for the period from the 29th July, 1864 [*or as the case may require*] to the 18 , both inclusive, and for annuities for the period from the 26th April, 1855 [*or as the case may require*] to the 18 , both inclusive, in the following name [*or* names].

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

[*Add declaration, Form II.*]

[*State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.*]

Signature, address, and description of person requiring the search.

Dated

FORM VII.

Certificate of Search by Enrolment Department under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office,
Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name [*or* names] of for the period from to , both inclusive, and that no deed or other document has been enrolled in the said office in that name [*or* in any one or more of those names] during the period aforesaid,

or and that except the described in the schedule hereto no deed or document has been enrolled in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

Certificate of Search by the Registrar of Bills of Sale under the Conveyancing Act, 1882.

Supreme Court of Judicature,
Central Office,
Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name [*or* names] of for the period from 18 , to 18 , both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during that period,
or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in that name [*or* in any one or more of those names] during the period aforesaid.

THE SCHEDULE.

Dated

FORM IX.

Certificate of Search by Registrar of Certificates of Acknowledgments of Deeds by Married Women under the Conveyancing Act, 1882, *s.* 2.

Supreme Court of Judicature,
Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name [*or* names] of for the period from to 18 , both inclusive, for a certificate dated the
or for certificates of acknowledgment of a deed dated the , *or* for certificates of acknowledgments of deeds relating to [*fill in the description of the property from the requisition*] and that no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid, *or* and that except the certificate [*or* certificates] described in the schedule hereto, no such certificate has been filed in that name [*or* in any one or more of those names] during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

FORM X.

Certificate of Search by Registrar of Judgments under Conveyancing Act, 1882, s. 2.

Supreme Court of Judicature,
Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to 18 , both inclusive, and for executions for the period from 18 to 18 , both inclusive, and for annuities for the period from to 18 , both inclusive, in the name [*or* names] of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid searches,

or and that except the mentioned in the schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name [*or* in any one or more of those names] during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.

Requisition for Continuation of Search under the Conveyancing Act, 1882.

Supreme Court of Judicature,
Central Office.

Requisition for Continuation of Search.

To the Clerk of Enrolments
or The Registrar of
Royal Courts of Justice,
London, W.C.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of , 18 , in the name [*or* names] of , from the day of to the day of , 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated

Form XII.

Certificate of result of continued Search under the Conveyancing Act, 1882, *s.* 2, *to be endorsed on Original Certificate.*

This is to certify that the search [*or* searches] mentioned in the within-written certificate has [*or* have] been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, *or* no instrument has been registered, or re-registered, as a bill of sale, *or* no certificate has been filed, *or* no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name [*or* in any one or more of the within-mentioned names].

Dated

THE SETTLED LAND ACT RULES, 1882.

1. The expression "the Act" used in these rules means the Settled Land Act, 1882.

Words defined by the Act when used in these rules have the same meanings as in the Act.

The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.

2. All applications to the court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.

3. The forms in the Appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form I. in the Appendix.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sects. 15 and 34, the trustees.

In the case of applications under sect. 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under sect. 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may,

after the petition has been filed, apply by summons in chambers (Appendix, Form XXIII.) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application, unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. VIII. in the Appendix.

8. Any sale authorized or directed by the court under the Act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct.

9. Where the court authorizes generally the tenant for life to make from time to time leases or grants for building or mining purposes under sect. 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorizes any such lease or grant in any particular case, or where the court authorizes a lease under sect. 15 of the Act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

10. Any person directed by the tenant for life to pay into court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into court. (Appendix, Forms IX., X., XI.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court, may contain directions for investment of the money on any securities authorized by sect. 21, sub-sect. 1 of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested.

13. Money paid into court under the Act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the Act. (Appendix, Forms IX., X., and XI.)

14. Any person paying into court any capital money arising under the Act shall be entitled first to deduct the costs of paying the money into court.

15. In all cases not provided for by the Act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the Act.

16. The fees and allowances to solicitors of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the court in respect to proceedings under the Act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX

TO THE SETTLED LAND ACT RULES, 1882.

Form I.

Title of Proceedings.

In the High Court of Justice,
Chancery Division.
Vice-Chancellor Bacon,
or
Mr. Justice Chitty,
[*or other judge before whom the application is to be heard.*]
In the matter of the estate [*or*, of the timber upon the estate], situate at , in the county of , [*or*, of the chattels], settled by a settlement made by an indenture dated the day of , and made between [*or*, by the Will of dated *or, as the case may be*].
And in the matter of the Settled Land Act, 1882.

Form II.

Formal part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on day, the day of , 18 , at o'clock in the forenoon, on the hearing of an application—

(*a.*) On the part of A. B., the tenant for life [*or*, tenant in tail, *or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (*b.*) On the part of A. B., the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant, by X. Y., his testamentary guardian [*or*, guardian appointed by order dated the *or*, next friend].

Or, (*c.*) On the part of C. D. and E. F., the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

Or, (*d.*) On the part of G. H., the tenant for life in remainder [*or*, tenant in tail in remainder, *or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of A. B. [*or as the case may be*].

Or, (*e.*) On the part of I. J., the purchaser of the lands [*or*, the timber upon the lands, *or* chattels, *or as the case may be*] settled by the above-mentioned settlement.

Or, (*f.*) On the part of I. J., the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned Act, of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (*g.*) On the part of I. J., the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

Or, (*h.*) On the part of K. L., interested under the contract hereinafter mentioned.

Dated the day of , 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons* (*if any*) *on whom the summons is to be served.*)

FORM III.

Summons under Section 10 *for General Leasing Powers.*

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant* that the said X. Y. during the infancy of the said A. B.], and each of his successors in title [*or in the case of an infant*, each of the successors in title of the said A. B.], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorised from time to time to make building [*or* mining] leases of the lands comprised in the said settlement for the term of years [*or* in perpetuity] on the conditions specified in the said Act [*or* on other conditions than those specified in sections 7 to 9 of the said Act].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

FORM IV.

Summons under Sections 10 *or* 15 *for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or* the said X. Y.] of the one part and of the other part, for a [building *or* mining] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the said A. B. [*or* X. Y.] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III.* 2.)

FORM V.

Summons under Sections 10 *or* 15 *for Authority to grant a particular Lease when no Contract has been entered into.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [building *or* mining] lease intended to be granted to of the lands [*or* of the mansion house, &c.] settled by the said settlement may, pursuant to section 10 [*or* 15] of the above-mentioned Act be approved, and that the applicant [*or* the said X.Y.] may be authorised to execute the same.

2. (*Add application for costs as in Form III.* 2.)

FORM VI.

Summons under Sections 15, 35, *or* 37 *for a Sale out of Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant* the said X. Y.] may be authorised to sell the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that C. D. and E. F., the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber,* out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act], *or if this Form is not applicable as in Form III.* 2.

FORM VII.

Summons under Sections 15, 35, *or* 37 *for Sale by the Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or* the timber ripe and fit for cutting] on the land [*or* the furniture and chattels], settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III.* 2.)

FORM VIII.

Affidavit verifying Title.

Title as in Form I.

I of make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which A. B. is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over, *or as the case may be*].

2. (*If it is the fact.*) The said A. B. is an infant of the age of years or thereabouts.

3. C. D., of , and E. F., of , are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act].

FORM IX.

Summons under Section 22 by Purchaser for Payment into Court of Purchase-Money of Settled Land, Timber, or Chattels.

Title as in Form I.

Formal parts as in Form II. *e.*

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement, dated the , and made "between [*or* will, &c.] proceeds of sale of the A. estate [*or as* "*the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ on account of the purchase-money of the said A. estate (*or as the case may be*) settled by the said settlement [*or* will, &c.].

2. That such directions may be given for the investment of the said sums when paid into court, and the accumulation or payment of the dividends of the securities representing the same, as the court may think proper.

FORM X.

Summons under Section 22 for Payment into Court by Lessee under a Mining Lease (*see* Section 11).

Title as in Form I.

Formal parts as in Form II. *f.*

1. That the applicant may be at liberty to pay into court to the credit of "In the matter of the settlement dated the and made "between [*or* the will, &c.] mineral rents under lease dated the "" , and in the matter of the Settled Land Act, 1882," the sum of £ , being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the , less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of and the day of in every year during the term created by the said lease to pay into court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the like credit, and that the dividends on the said when purchased may be paid to A. B., the tenant for life under the above-mentioned settlement during his life or until further order.

FORM XI.

Summons under Section 22 *for Payment into Court by Mortgagee* (*see* Section 18).

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into court to the credit of "Money advanced on mortgage of lands settled by the settle- "ment dated the , and made between [*or* the will, &c.], "and in the matter of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII.* 2.)

FORM XII.

Summons under Section 26 (1).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III.* 2.)

FORM XIII.

Summons under Section 26, *Sub-section* (2) (ii) *for Appointment of an Engineer or Surveyor.*

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That M. N., of , engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii) of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XIV.

Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We, C. D. of , and E. F. of , the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate , of , engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii) of the said Act.

(Signed) C. D.
E. F.

FORM XV.

Summons under Section 26, *Sub-section* (2) (iii).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That C. D. and E. F. the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said C. D. and E. F. under the said Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XVI.

Summons under Section 26, *Sub-section* 3.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the .

2. (*Add application for costs as in Form III.* 2.)

FORM XVII.

Summons under Section 31.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or* carry into effect *or* vary *or* rescind, *as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III.* 2.)

FORM XVIII.

Summons under Section 34 *for application of Money paid for a Lease or Reversion.*

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or* life *or* a reversion *or other interest, describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

2. (*Add application for costs as in Form III.* 2.)

FORM XIX.

Summons under Section 38 *for the Appointment of new Trustees.*

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That G. H. and I. J. may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III.* 2.)

FORM XX.

Summons under Section 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).

2. (*Add application for costs as in Form III.* 2, *or as the circumstances require.*)

FORM XXI.

Summons under Section 56 *for Advice and Direction.*

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the judge on the following questions:—

1. Whether
2. Whether
3. Whether

(*or if the questions involve complicated facts*)

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

(*Add application for costs as in Form III.* 2.)

FORM XXII.

Summons under Section 60 for Appointment of Persons to exercise Powers on behalf of Infant.

Title as in Form I.

Formal parts as in Form II. *b.*

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act (*or such other powers as it is desired to exercise*) may be exercised by the said on behalf of the said during his minority.

2. (*Add application for costs as in Form III.* 2.)

FORM XXIII.

Summons for Directions as to Service of a Petition.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the day of 18 .

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

GENERAL RULES.

By virtue and in pursuance of the Land Charges Registration and Searches Act, 1888, I, Hardinge Stanley, Baron Halsbury, Lord High Chancellor of Great Britain, do make the following General Rules for the purpose of carrying the said Act into effect:—

Rule 1.—The several registers established by the Act shall contain the following particulars respectively, or such other particulars as the registrar shall from time to time determine:—

(1.) The register of writs and orders shall contain:—

(*a.*) The name, address, and description of the person whose land is affected.

(*b.*) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made.

(*c.*) The date of registration, and of any renewal of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(2.) The register of deeds of arrangement shall contain:—

(*a.*) The name, address, and description, of the person whose land is affected.

(*b.*) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

(3.) The register of land charges shall contain:—

(*a.*) The name, address, and description, and capacity (that is to say, whether (i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the court rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or

for years) of the person in whose name the registration is made.

(*b.*) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated.

(*c.*) The date of registration.

(*d.*) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the registers themselves, all entries in such registers being made alphabetically in the manner now used in the Register of Judgments in the Central Office of the High Court of Justice, or in such other manner as the registrar shall from time to time determine.

Rule 4.—Applications for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the schedule hereto, or in such other forms as the registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the Office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the register, such evidence in respect thereof as the registrar shall from time to time think necessary shall be required.

Rule 8.—These Rules may be cited as the Land Charges Rules, 1889.

HALSBURY, C.

January 1, 1889.

THE SCHEDULE.

FORMS.

Form 1.

Application to Register a Writ or Order.

REGISTER OF WRITS AND ORDERS.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration day of , 18 . By ——— of . (*Signed*) ——— Applicant [*or* Solicitor].	A of the Division of the High Court. Dated the day of , 18 . *Title of the Action or Matter* ——— ——— Plaintiff. ——— Defendant.

Name of the Person whose Estate is affected.

Surname.	Christian Name or Names.	Address.	Title, Trade, or Profession.

Form 2.

Application to Register a Deed of Arrangement.

REGISTER OF DEEDS OF ARRANGEMENT.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration the day of , 18 . By ——— of . (*Signed*) ——— Applicant [*or* Solicitor].	Date of the deed . *Parties to the Deed.** ——— ——— ———

* Names only; and, where the creditors are numerous, enter the names of the first three, adding "and others."

Name of the Person whose Estate is affected.

Surname.	Christian Name or Names.	Address.	Title, Trade, or Profession.

FORM 3.

Application to Register a Land Charge.

REGISTER OF LAND CHARGES.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Filed for Registration the day of , 18 . By of . (*Signed*) Applicant [*or* Solicitor].	A charge upon lands in the Parish(es) of . Dated the day of , 18 . By virtue of the statute .

The Person in whose Name the Registration is to be made.

Surname.	Christian Name.	Address.	Title, Trade, or Profession.	Capacity.*

* Here state whether beneficially entitled to the first estate of freehold, or to a lease for lives or life, or for a term of years, or whether tenant on the court rolls of the manor.

FORM 4.

Declaration in support of an Application to Register.

I, , of , solemnly and sincerely declare that the writ [order, deed, charge], whereof the particulars are set forth in the application for registration thereof, marked "A," and now produced and shown to me, was actually issued [made, executed] at the time and in the manner in the said application mentioned, and that the particulars set forth therein are to the best of my knowledge, information, and belief, true.

And I make, &c.

FORM 5.

Application for an Official Search.

APPLICATION FOR OFFICIAL SEARCH.

N.B.—This Form may be filled in for a future day not less than three days subsequent to its arrival in the office.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Please search the Register of Writs and Orders for the period of five years ending the of , 18 , inclusive. [Deeds of Arrangement from the of , 18 , to the of , 18 , inclusive. Land Charges from the of , 18 , to the of , 18 , inclusive.]

Surname or Names.	Christian Name or Names.	Address or Addresses.*	Titles, Trades, or Professions.*

* If the person against whom the search is to be made has more than one address, title, trade, or profession, this may be filled up accordingly.

I declare that the above search(es) is (are) required for the purposes of a sale [mortgage, lease *or*, (*as the case may be*)] from to .

N.B.—State here whether certificate to be sent by post or to be kept till called for.

Signature, Address, and Description of the Applicant or Solicitor. } ———— ———— ————

Dated this of , 18 .

FORM 6.

Declaration by separate Instrument as to purposes of Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

I declare that the search(es) in the name(s) of required by the application of dated the of 18 , is (are) required for the purposes of a sale [mortgage, lease *or*, (*as the case may be*)] from to .

Signature and address of applicant or solicitor:

———— of ————.

Dated this of 18 .

FORM 7.

Certificate of Official Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

This is to certify that there are no entries in the Register of Writs and Orders for the period of five years ending inclusive, [Deeds of Arrangement from to inclusive, Land Charges from to inclusive], in the names of except the following:—

Dated this of 18 .

(*Land Registry Search Department.*)

FORM 8.

Requisition for Continuation of Official Search.

LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

Office of Land Registry.

Please continue the search(es) in the Register(s) of made pursuant to the requisition dated the of 18 in the name(s) of down to the of 18 inclusive.

Signature and address of applicant or solicitor: ———

Dated this of 18 .

N.B.—The certificate of the original search must be forwarded with this application.

FORM 9.

Certificate of Continuation of Official Search (to be endorsed on the original Certificate).

This is to certify that there are no further entries in the Register of against the within name(s) down to the of 18 inclusive, except the following, namely,

In the Register of .

Dated this of 18 .

(*Land Registry Search Department.*)

APPENDIX II.

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APPENDIX II.

THE VENDOR AND PURCHASER ACT, 1874.

(37 & 38 Vict. c. 78.)

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land. [7th August, 1874.]

Whereas it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Forty years substituted for sixty years as the root of title.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

The Act contains no definition of "land." It is conceived that the word does not here include incorporeal hereditaments: see Dart, V. & P. 6th ed. p. 160; *ibid.* p. 336, note (*t*).

Sect. 2. Rules for regulating obligations and rights of vendor and purchaser.

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

See also Conv. Act, 1881, s. 3, sub-s. (1), and note thereon, p. 7, *ante*.

This has not altered the rule, that a lessee has constructive notice of the lessor's title, but he remains in the same position with regard to notice as if, before the Act, he had stipulated not to inquire into the lessor's title. (*Patman* v. *Harland*, 17 Ch. D. 353.)

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

As to misleading recitals, see note on Conv. Act, 1881, s. 3, sub-s. (3), p. 9, *ante*.

It was held in *Bolton* v. *London School Board*, 7 Ch. D. 766, that the obligation to prove the earlier details of a forty years' title is satisfied by the production in the title of a deed more than twenty years old, containing a recital that the vendor was seised in fee simple. This will not exonerate the vendor from abstracting and producing the earlier title, or prevent the purchaser from impugning it upon evidence derived *aliunde*, or appearing on the face of the abstract.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

Sect. 3. Trustees may sell, &c., notwithstanding rules.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

Compare the Conv. Act, 1881, s. 66, p. 148, *ante*.

Sect. 4. *Legal personal representative may convey legal estate of mortgaged property.*

4. *The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.*

Repealed by the Conv. Act, 1881, s. 30, sub-s. (2), p. 91, *ante*.

This section did not apply to a transfer of a mortgage; and therefore the legal personal representative of the mortgagee could not, on receiving payment of the mortgage debt, convey the legal estate to a transferee. (*Re Spradbery's Mortgage*, 14 Ch. D. 514.)

The word "convey" seems to mean "re-convey." It was accordingly held in *Re White's Mortgage*, W. N. 1881, p. 115; 29 W. R. 820, that the executors of a deceased mortgagee, who in his lifetime had contracted to sell, and whose will contained no devise of trust or mortgage estates, could not convey the legal estate of freeholds.

Sect. 5. *Bare legal*

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple,*

such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

estate in fee simple to vest in executor or administrator.

Repealed as to England by 38 & 39 Vict. c. 87 (the Land Transfer Act, 1875), s. 48, and re-enacted so far as regards the death of a bare trustee intestate. The last-mentioned enactment was repealed by the Conv. Act, 1881, s. 30, sub-s. (2), p. 91, *ante*. The section is repealed as to Ireland by the Conv. Act, 1881, s. 73, p. 154, *ante*.

The Land Transfer Act, 1875, s. 48, is as follows:—

"48. Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act; and, instead thereof, be it enacted that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of 'The Vendor and Purchaser Act, 1874,' shall not apply to lands registered under this Act."

Upon the meaning of the phrase "bare trustee," see *Christie* v. *Ovington*, 1 Ch. D. 279; *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. D. 582; *Re Docwra*, *Docwra* v. *Faith*, 29 Ch. D. 693.

Sect. 6.

Married woman who is a bare trustee may convey, &c.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a feme sole.

Compare the M. W. P. Act, 1882, s. 18, p. 346, *ante;* and see *Re Docwra*, *Docwra* v. *Faith*, 29 Ch. D. 693, cited in note thereto.

Sect. 7.

Protection and priority by legal estates and tacking not to be allowed.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

This section was repealed as from the date at which it came into operation, as to England by 38 & 39 Vict. c. 87 (the Land Transfer Act, 1875), s. 129, "except as to anything duly done thereunder before the commencement," (1st January, 1876,) of that Act, and as to Ireland by the Conv. Act, 1881, s. 73, p. 91, *ante*. As to the circumstances under which it has been said that this section may, notwithstanding the repeal, have some operation, see *Robinson* v. *Trevor*, 12 Q. B. D. 423, at p. 433.

Sect. 8.

Non-registration of will in Middlesex, &c. cured in certain cases.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

As to the effect before this Act of non-registration within the prescribed time, see *Chadwick* v. *Turner*, L. R. 1 Ch. 310.

Sect. 9. Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

The parties to a summons under this section stand, as regards evidence, in the same position as parties in a reference as to title in an action for specific performance; and therefore they are entitled, as of right, to read evidence relating to requisitions upon the title, without obtaining any directions from the judge. (*Re Burroughs, Lynn and Sexton*, 5 Ch. D. 601.) But it has been held that on a summons to decide whether a purchaser is entitled to the insertion of a particular covenant in his conveyance, the Court cannot decide a preliminary question of fact. (*Re Gray and Metropolitan Railway Co.*, 44 L. T. 567.)

In addition to deciding the express point in dispute, the Court has jurisdiction to give consequential relief. For example, after deciding that a defect is fatal to the title, the Court may order the return of the deposit, and payment of the costs of investigating the title. (*Re Hargreaves and Thompson's Contract*, 32 Ch. D. 454, approving *Re Yeilding and Westbrook*, 31 Ch. D. 344, and *Re Higgins and Hitchman's Contract*, 21 Ch. D. 95, at p. 99.) But there is no jurisdiction to entertain a summons taken out solely for the purpose of recovering money, for instance, interest on purchase-money paid in error. (*Re Young and Harston's Contract*, 29 Ch. D. 691. Upon appeal, *S. C.*, 31 Ch. D. 168, the question of jurisdiction was expressly waived.)

A question whether a notice to rescind is valid, is not a question affecting the validity of the contract so as to take the case out of the jurisdiction under this section. (*Re Jackson and Woodburn's Contract*, 37 Ch. D. 44.)

There is no jurisdiction to decide questions as to the destination of the purchase-money, unless they affect the purchaser. (*Re Tippett's and Newbould's Contract*, 37 Ch. D. 444, at p. 446.)

It has been held that a purchaser who has obtained an order on a summons disposing of his objections and ordering the vendor to make compensation is not entitled, if the vendor refuses to comply with the order, to bring an action for specific performance and damages; but should apply in chambers to have the order enforced. (*Thompson* v. *Ringer*, W. N. 1881, p. 48; 29 W. R. 520.)

An appeal against an order made on a summons under this section must be brought within twenty-one days. As to the principles on which an extension of time may be allowed, see *Re Blyth and Young*, 13 Ch. D. 416; *Re New Callao*, 22 Ch. D. 484.

Sect. 10. Extent of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

THE SETTLED ESTATES ACT, 1877 (*a*).

(40 & 41 Vict. c. 18.)

An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates. [28th June, 1877.]

Whereas it is expedient to consolidate and amend the law relating to leases and sales of settled estates:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. Short title.

1. This Act may be cited for all purposes as "The Settled Estates Act, 1877."

Sect. 2. Interpretation of "settlement" and "settled estates."

2. The word "settlement" as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.

The term "settled estates" as used in this Act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

Sect. 3. Interpretation of "the Court."

3. The expression "the Court" in this Act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this Act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of

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(*a*) As to certain cases in which this Act may still be found useful, see Dart, V. & P. 6th ed. p. 1295.

the High Court of Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.

The expression "the Court" in this Act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.

Sect. 4. Power to authorize leases of settled estates.

4. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term herein-before specified in that behalf:

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease:

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Fourthly. No such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

Sect. 5. Leases may contain special covenants.

5. Subject and in addition to the conditions herein-before mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.

Sect. 6. Parts of settled estates may be leased.

6. The power to authorize leases conferred by this Act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Sect. 7. Leases may be surrendered and renewed.

7. Any leases, whether granted in pursuance of this Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorize leases conferred by this Act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease.

Sect. 8. Power to authorize leases to extend to preliminary contracts.

8. The power to authorize leases conferred by this Act shall extend to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.

Sect. 9. Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

9. All the powers to authorize and to grant leases contained in this Act shall be deemed to include respectively powers to authorize the lords of settled manors and powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under this Act.

Sect. 10. Mode in which leases may be authorized.

10. The power to authorize leases conferred by this Act may be exercised by the Court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned.

Sect. 11. What evidence to be produced on an application to authorize leases.

11. When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized.

Sect. 12. After ap-

12. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or

proval of a lease, Court to direct who shall be the lessor.

persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

Sect. 13. Powers of leasing may be vested in trustees.

13. Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

Sect. 14. Conditions that leases be settled by the Court not to be inserted in orders made under this Act.

14. Provided always, that in orders under this Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the Court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

Sect. 15. Conditions where inserted may be struck out.

15. Provided also, that in all cases of orders (whether under this Act or under the corresponding enactment of the Acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition, and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

Sect. 16. Court may authorize

16. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and

restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

sales of settled estates and of timber.

17. *It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income.*

Sect. 17. *Proceedings for protection.*

Repealed by the S. L. Act, 1882, sect. 64, *ante*.

18. When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

Sect. 18. Consideration for land sold for building may be a fee-farm rent.

19. On any sale of land any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable.

Sect. 19. Minerals, &c. may be excepted from sales.

20. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

Sect. 20. Court may authorise dedication of any part of settled estates for streets, roads, and other works.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the Court may direct

Sect. 21. As to laying

out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or to be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the Court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the Court shall seem advisable.

Sect. 22. How sales and dedications are to be effected under the direction of the Court.

22. On every sale or dedication to be effected as herein-before mentioned the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.

Sect. 23. Application by petition to exercise powers conferred by this Act.

23. Any person entitled to the possession or to the receipts of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the Court by petition in a summary way to exercise the powers conferred by this Act.

Sect. 24. With whose consent such application to be made.

24. Subject to the exceptions herein-after contained, every application to the Court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate

or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

Sect. 25. Court may dispense with consent in respect of certain estates.

25. Provided always, that where an infant is tenant in tail under the settlement, it shall be lawful for the Court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

Sect. 26. Notice to be given to persons who do not consent to or concur in the application.

26. Provided always, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the Court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.

Sect. 27. Court may dispense with notice under certain circumstances.

27. Provided also, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the Court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the Court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the Court.

Sect. 28. Court may dispense with consent, having regard to the number and interests of parties.

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

Sect. 29. Petition may be granted without consent, saving rights of non-consenting parties.

29. Provided nevertheless, that it shall be lawful for the Court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the Court, or whose rights, estate, or interest ought in the opinion of the Court to be excepted.

Sect. 30. Notice of application to be served on all trustees, &c.

30. Notice of any application to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the Court ought to be so served, unless the Court shall think fit to dispense with such notice.

Sect. 31. Notice of application to be given in newspapers if Court direct.

31. Notice of any application to the Court under this Act shall, if the Court shall so direct, but not otherwise, be inserted in such newspapers as the Court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit.

Sect. 32. No application under this Act to be granted where a similar application has been rejected by Parliament.

32. The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private Act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the Bill may have been referred.

Sect. 33. Notice of the exercise of powers to be given as directed by the Court.

33. The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake.

Sect. 34. Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

34. All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into Court ex parte the applicant in the matter of this Act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the Accountant-General ex parte the applicant in the matter of this Act; and such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland

the purchase or redemption of rentcharge in lieu of tithes, Crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

Sect. 35. Trustees may apply moneys in certain cases without application to Court.

35. The application of the money in manner aforesaid may, if the Court shall so direct, be made by the trustees (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Sect. 36. Until money can be applied to be invested, and dividends to be paid to parties entitled.

36. Until the money can be applied as aforesaid, the same shall be invested as the Court shall direct in some or one of the investments in which cash under the control of the Court is for the time being authorised to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Sect. 37. Court may direct application of money in respect of leases or reversions as may appear just.

37. Where any purchase money paid into Court under the provisions of this Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court on the petition of any party interested in such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

Sect. 38. Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

38. The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

Sect. 39. Court not to authorise any act which could not have been authorised by the settlor.

39. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.

Sect. 40. Acts of the Court in professed pursuance of this Act not to be invalidated.

40. After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.

Sect. 41. Costs.

41. It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct.

Sect. 42. Rules and orders.

42. General rules and orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect to such matters, shall be made so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and so far as relates to proceedings in Ireland, by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the Court.

Sect. 43. Rules and orders to be

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if Parliament is then sitting, or if not, within

forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same. laid before Parliament.

Sect. 44. Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

44. The powers vested in the High Court of Justice by this Act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of Court for the purposes aforesaid, so far as relates to proceedings in the said Court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorised under this Act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

Sect. 45. Application for lease or sale in Ireland may be made to Landed Estates Court.

45. It shall and may be lawful for any person who under the provisions of this Act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned Court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this Act, save that the Judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the Act of the twenty-first and twenty-second years of Her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said Act.

Sect. 46. Tenants for life, &c. may grant leases for 21 years.

46. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall

contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.

Sect. 47. Against whom such leases shall be valid.

47. Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

Sect. 48. Evidence of execution of counterpart lease by lessee.

48. The execution of any lease by the the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

Sect. 49. Provision as to infants, lunatics, &c.

49. All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.

Sect. 50. A married woman apply-

50. Where a married woman shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined* apart from her husband touching her know-

ledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

ing to the Court, or consenting to be examined apart from her husband.

* Separate examination is now unnecessary in the case of a married woman who, under the Married Women's Property Act, 1882, is entitled to the property as a *feme sole*. (*Riddell* v. *Errington*, 26 Ch. D. 220; *Re Harris' Settled Estates*, 28 Ch. D. 171.)

Sect. 51. Examination of married woman how to be made when residing within the jurisdiction of the Court, and how when residing without such jurisdiction.

51. The examination of such married woman, when resident within the jurisdiction of the Court to which such application is made, shall be made either by the Court or by some solicitor duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, and such person shall certify under his hand to the effect herein-before provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

Sect. 52. As to application by or consent of married women, whether of full age or under age.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

Sect. 53. No obligation to make or consent to application, &c.

53. Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

Sect. 54. Tenants for life, &c. to be deemed entitled notwithstanding incumbrances.

54. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

Sect. 55. Exception as

55. Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any

to entails created by Act of Parliament.

settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants-in-tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

Sect. 56. Saving rights of lords of manors.

56. Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

Sect. 57. To what settlements this Act to extend.

57. This Act shall, except as herein-after provided, apply to all matters existing at the time of the passing of this Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this Act as if the matter originated under this Act, or may be continued or taken under the Acts hereby repealed, or partly under this Act and partly under the said repealed Acts as occasion may require: Provided always, that the provisions in this Act contained respecting demises to be made without application to the Court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six.

Sect. 58. Repeal of Acts specified in schedule.

58. The Acts specified in the schedule to this Act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

Sect. 59. Saving.

59. Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament not expressly repealed by this Act.

Sect. 60. Extent of Act.

60. This Act shall not extend to Scotland.

Sect. 61. Commencement of Act.

61. This Act shall commence on the first day of November one thousand eight hundred and seventy-seven.

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120..	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 ..	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 ..	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 ..	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 ..	The Settled Estates Act, 1876.

THE LAND DRAINAGE ACT, 1861.

(24 & 25 Vict. c. 133.)

Sections 34, 35 and 36.

"Liabilities by reason of Tenure.

Sect. 34. Power to commute liabilities to repair by reason of tenure.

"**34.** The commissioners may, with the consent of the Inclosure Commissioners, testified in writing under their common seal, commute, for such sums of money as they think expedient, the obligation imposed on any person, by reason of tenure, custom, prescription, or otherwise, to repair any walls, maintain any sewer, or do any other work within their jurisdiction.

Sect. 35. Nature of commutation.

"**35.** Any commutation so made may be by way of gross or annual charge on the lands of the person in respect of which the original obligation arose; and any charge so created shall be recoverable by the commissioners in the same manner in which tithe rentcharge is recoverable, and shall have priority over all incumbrances created or to be created by any proprietor of the lands on which the same is charged.

Sect. 36. Deposit of record of commutation.

"**36.** The record of any such charge as aforesaid shall be deposited in the office of the clerk of the peace of the county in which the district or the greater part of the district within the jurisdiction of the commissioners is situate; and such record, or any certified copy thereof, shall be receivable in evidence in all legal proceedings."

THE AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

(46 & 47 Vict. c. 61.)

Section 29.

Sect. 29. Power for landlord on paying compensation to obtain charge.

29. A landlord, on paying to the tenant the amount due to him in respect of compensation under this Act, or in respect of compensation authorized by this Act to be substituted for compensation under this Act, or on expending such amount as may be necessary to execute an improvement under the second part of the First Schedule hereto, after notice given by the tenant of his intention to execute such improvement in accordance with this Act, shall be entitled to obtain from the county court a charge on the holding, or any part thereof, to the amount of the sum so paid or expended.

The court shall, on proof of the payment or expenditure, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, make an order charging the holding, or any part thereof, with repayment of the amount paid or expended, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, where an award has been made, be taken to have been exhausted according to the declaration of the award, and in any other case after the time when any such improvement will in the opinion of the court, after hearing such evidence (if any) as it thinks expedient, have become exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators, and assigns.

The estate or interest of any landlord holding for an estate or interest determinable or liable to forfeiture by reason of his creating or suffering any charge thereon shall not be determined or forfeited by reason of his obtaining a charge under this Act, anything in any deed, will, or other instrument to the contrary thereof notwithstanding.

45 & 46 Vict c. 38.

Capital money arising under the Settled Land Act, 1882, may be applied in payment of any moneys expended and costs incurred by a landlord under or in pursuance of this Act in or about the execution of any improvement mentioned in the first

or second parts of the schedule (*a*) hereto, as for an improvement authorised by the said Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under or in pursuance of this Act in respect of any such improvment as aforesaid, as in discharge of an incumbrance authorised by the said Settled Land Act to be discharged out of such capital money.

FIRST SCHEDULE.

PART I.

IMPROVEMENTS TO WHICH CONSENT OF LANDLORD IS REQUIRED.

(1.) Erection or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.
(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making of fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Reclaiming of waste land.
(13.) Warping of land.
(14.) Embankment and sluices against floods.

PART II.

IMPROVEMENT IN RESPECT OF WHICH NOTICE TO LANDLORD IS REQUIRED.

(15.) Drainage.

(*a*) This seems to mean the First Schedule.

REPORT

Of the Case of Marquis Camden *v.* Murray (*b*).

[*Reprinted, by permission, from "The Times,"* 19*th July*, 1883.]

The present case was a petition presented under the Settled Estates Act on behalf of the present Marquis Camden, an infant of eleven years of age, the tenant in tail in possession of the family estates, for the confirmation by the Court of the sale of the Wildernesse mansion-house and land adjoining thereto to its present lessee for a sum of 160,000*l.*, the timber (which was estimated to be worth 20,000*l.*) to be taken at a valuation. It appeared that the Camden family property comprised, among other properties, two estates in Kent, some twenty miles apart, namely, Wildernesse estate, Sevenoaks, consisting of some 1,400 acres, producing about 1,500*l.* net annual income, and the Bayham Abbey estate, Lamberhurst, consisting of a mansion-house and some 10,000 acres, producing about 6,000*l.* or 7,000*l.* net annual income. It was proposed to sell, with the Wildernesse mansion-house, about 1,240 acres, at present producing 1,400*l.* net per annum. The sale was opposed by the infant's paternal uncles, Lord George Pratt and Lord Charles Pratt, who were the tenants for life in remainder under the settlement, and who had on previous occasions successfully opposed proceedings taken in Chancery, having as their object that of the present petition. The trustees of the settlement, which was made by the will of the second marquis, had powers of sale extending over the whole or any part of the devised estates, but one of the two present trustees declined to exercise such power.

Mr. Justice Chitty said that when a similar application was made to the late Vice-Chancellor Malins, the sole question before the Court was whether the Court, supposing it had any jurisdiction, could properly exercise such jurisdiction in controlling the power of sale vested in the trustees, when one of the trustees declined to put such power in force. That learned judge held (*Marquis Camden* v. *Murray*, L. R. 16 Ch. D. 161, at p. 165) that the only state of circumstances which could authorize the interference of the Court, by entertaining applications of the present kind, was one of absolute and overwhelming necessity. He quite agreed with the decision of the Vice-Chancellor, for the Court would not compel the trustees to exercise a power which was not compulsory upon them, and interfere with their discretion in the exercise of what was a mere power and not a trust. The decision, which might almost be treated as a matter of

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(*b*) See p. 212, *ante*.

course result of the case as then before the Court, in no way involved the general question of the jurisdiction to sell estates belonging to infants. The present question, in the same form as it was put before the Vice-Chancellor, was afterwards put by the present parties before Lord Justice (then Mr. Justice) Fry, and he had no other course to take but to adopt the decision of the Vice-Chancellor, and refuse the application. The case then found its way to the Court of Appeal, and the decision of Lord Justice Fry was affirmed, but the late Master of the Rolls, while dismissing the appeal, suggested, without passing any judicial opinion, that the case was put before the Court in the wrong form, and that the better course would be to adopt the means of procedure provided by the Settled Estates Act, 1877. He (Mr. Justice Chitty) therefore had to decide the case according to the provisions of that Act. The position of the parties was as follows:—The infant was tenant in tail in possession, and the respondents, the paternal uncles of the infant, were tenants for life in remainder, whose sons, if they had any—and, as a matter of fact, at the present time they had no children now living—would take in succession in the ordinary way as tenants in tail. While the paternal uncles opposed the petition, it was supported by Lord Roden, who had been appointed guardian of the infant for the purposes of the Act, and also by the guardians of the person of the infant—namely, his mother, Lady Camden, Captain Green, and the late Duke of Marlborough. The evidence of the last-mentioned nobleman, whose opinion on such a matter was of weight, as based on knowledge and experience, clearly pointed to the advisability of adopting the proposed sale. He stated in his affidavit that, having regard to the acute depression of agricultural property and the doubt whether landed estate would ever again acquire its former fancy value, the realization of so large a sum as 160,000*l.*, exclusive of timber, would in his judgment, be of great advantage to the plaintiff and all other persons interested in the estate, and he was of opinion that it was for the benefit of all such persons, and, as one of the guardians of the infant, he was desirous that the conditional contract should be confirmed and carried into effect. Mr. P. B. Beresford-Hope, who had been appointed a trustee of the settlement, stated his opinion in the same way, and also supported the sale. The remaindermen had filed affidavits in opposition, pointing to the inadequacy of the price and the undesirability of selling a place to which the family was attached. The evidence on both sides had to be considered, and also the value of the estates subject to the settlement. The whole of the estates in settlement, less deductions and charges, appeared to produce at present some 9,000*l.* per annum. Of this income about 1,400*l.* was produced by the Wildernesse estate and about 6,400*l.* by the Bayham Abbey estate. With reference to the question of family affection, it was certainly more likely that such affection should attach to the Wildernesse, for it was the older residence of the family. But when this point was advanced by the remaindermen, there was to be considered the circumstance that both of them, together with the third marquis, the father of the infant, were parties to a private Act of 1869, whereby the sum of 50,000*l.* was raised

out of the estates for the purpose of building at Bayham Abbey a house "suitable for the residence of the Marquis Camden for the time being," and under which the heirlooms were removed from the Wildernesse to Bayham Abbey. The language of the Act, although in one sense that of the Legislature, was in another that of the persons who promoted the Act, and therefore the preamble of the Act which recited its desirability must be held, to some extent, to express the opinion of the present respondents. Moreover, the Wildernesse estate had been let to its present tenant for some seventeen years, commencing during the lifetime of the second marquis and covering the whole marquisate of the third marquis. It therefore appeared to his lordship that the Wildernesse had been abandoned as the residence of the family, and that Bayham Abbey must be considered to be the family residence. The proposed sale, if carried out, would materially increase the income of the family settlement. Roughly speaking, the sum of 180,000*l.* would, if invested in Consols, produce 5,400*l.* Such a sum, if accumulated during the minority of the present marquis, would, when he became of age, be represented by a sum of some 230,000*l.* This calculation was based on the supposition that the income of the proceeds of sale would follow the trusts of the settlement, and its accumulation form part of the corpus of the trust estate. It was, however, said that the accumulations would never amount to the sum estimated, for if this sale was effected applications for increased maintenance would forthwith be made by the guardians of the infant. Such a consideration, however, could not, in determining the desirability of the sale, be regarded by the Court, for each and every application which might tend to diminish the fund would have to be made to the Court, and be considered on its own merits. The increase to the estate as approximately arrived at must be considered, and also the fact that, were the exceptionally favourable offer by the present lessee of the Wildernesse declined, the house and lands held therewith might be unoccupied for a time, and prove the cause of positive loss to the estate, the present lessee being a tenant from year to year only, and having expressed his intention of securing a permanent residence elsewhere if his offer fell through. It was true that evidence had been advanced by the remaindermen, showing that the estate might be laid out as a building estate, and as such had a rising value, but the material advantage arising from treating the estate in that way, and its preference over the sale now proposed, was not pointed out in the affidavits of the surveyors, whose opinion had been given, and the sum of 180,000*l.* down for the whole estate might clearly be said to more than counterbalance the uncertain and speculative sale of the estate in portions of building lots for comparatively small sums payable from time to time. It was, in his lordship's opinion, an advantage to all parties to sanction the proposed sale. The Court, however, would be very reluctant to put in force its jurisdiction, derived from the Settled Estates Act, to sell an old family estate. Here, however, there was more than one family estate, and the principal family estate appeared to be, not the estate proposed to be sold, but Bayham Abbey, and he was also satisfied that the income of the settled property,

if not increased by some such measure as that now proposed, would be insufficient to keep up a second mansion-house. For these considerations, while not losing sight of the family affection entertained for the Wildernesse by the remaindermen, he felt that it was truly advantageous to the property and parties interested to sanction the sale. By the 16th section of the Settled Estates Act it was provided that it should be lawful for the Court, if it should deem it proper and consistent with a due regard for the interests of all parties entitled, and subject to the restrictions in the Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates, &c. It was, therefore, clear that the Court, while exercising its power under the Act, must have regard to the interests of the tenant in tail, but also would fail in its duty if it regarded those interests solely to the exclusion of other parties interested. There was, moreover, another and an important provision in the Act, which was an entirely new introduction, and was carefully considered by those who framed the Act. This was the provision of the 25th section, to the effect that where an infant was tenant in tail under the settlement it should be lawful for the Court, if it should think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant. After having fairly considered the case in all its details, he was satisfied that the sale was to the interest of all parties, and the case was one in which, under the jurisdiction conferred by the 25th section, the concurrence of the remaindermen might be properly dispensed with. He should, therefore, make an order confirming the sale, but as the opposition was not of an improper kind, he should direct the costs of all parties to come out of the sale moneys.

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THE END.

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